

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
The State of Missouri
AT THE
APRIL TERM, 1882.

BROWN *et al.*, Appellants, v. BARRETT.

Vendor's Lien: INNOCENT PURCHASER. Plaintiffs sold their land to one B., agreeing to receive in part payment of the purchase money a note which afterward turned out to be forged. Before the conveyance was consummated defendant took B.'s purchase off his hands and received a deed direct from plaintiffs, paying plaintiffs in part in the forged note, but without knowing of the forgery. *Held*, that the defendant was entitled to be treated as an innocent purchaser from B., and that plaintiffs could not enforce against the land in his hands a vendor's lien for the amount of the note.

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Appeal from Saline Circuit Court.—HON. WM. T. WOOD,
Judge

AFFIRMED.

O. A. Crandall for appellants.

Before the contract between appellants and Ed. J. Brown had been executed, and while the title to the land in controversy was still in appellants, the defendant Barrett became their vendee, instead of Brown. By his trade with Brown, he took his place in the contract with the appellants—became the holder of the forged note, and undertook to pay all the purchase money for the land. It is well settled that a payment in forged or counterfeit notes is no payment at all; therefore, the delivery of the note and deed of trust for \$5,000, which turned out to be forgeries, was no payment, but simply a nullity, and the amount of said forged note and interest is still due the appellants, for which they have a vendor's lien. Story on Notes, (5 Ed.) § 118; 2 Parsons Notes and Bills, 589, 590; 1 Daniel Negot. Inst., §§ 730, 731; *Markle v. Hatfield*, 2 John. 455; *Ontario Bank v. Lightbody*, 13 Wend. 101; *Simms v. Clark*, 11 Ill. 137; *Magee v. Carmack*, 13 Ill. 289; *Goodrich v. Tracy*, 43 Vt. 314; *s. c.*, 5 Am. Rep. 281.

George G. Vest and *Philips & Jackson* for respondent.

HENRY, J.—In September, 1870, plaintiffs sold to E. J. Brown a tract of land in Pettis county for \$13,390, which was to be paid as follows: \$1,000 in sheep, \$7,390 in cash, and the balance, \$5,000, in a note purporting to have been executed by Henry J. Smith and secured by a deed of trust on 1,280 acres of land in Clay county, Iowa. There was a written contract between the parties embodying the terms of the agreement. The sheep were delivered, and it was agreed between the vendors and the vendee that the

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vendors should execute a deed to the vendee for the Pettis county land, and leave it with Barrett until the balance of the purchase money and the said note and mortgage should have been paid and delivered to the vendors. The deed was executed and placed in Barrett's hands, and the balance of the purchase money and the note and mortgage were ultimately deposited with Barrett by E. J. Brown, but discovering a defect in the title of plaintiffs to the Pettis county land, the payment of the balance of the purchase money and the delivery of the note and mortgage of Smith, were deferred until the title should be perfected, and before this was done, Barrett purchased of E. J. Brown the Pettis county land, and, instead of taking a deed from him to the land, it was arranged that he should receive a deed directly from plaintiffs. The balance of the purchase money was then paid, and Smith's note and mortgage were delivered to plaintiffs, and they executed to Barrett a deed for the Pettis county land.

This suit was to enforce a vendor's lien against the land for the amount of the Smith note, plaintiffs alleging and proving that they were forgeries. It was also averred that Barrett knew that the note and mortgage were forged, and that the payment of that amount of the price he was to pay E. J. Brown for the land, was made with that note and mortgage. Barrett alleged that he paid E. J. Brown, of his own money and effects, the full amount he agreed to pay for the land, and that he delivered the note and mortgage of Smith to plaintiffs for E. J. Brown in compliance with the original agreement between E. J. Brown and plaintiffs, in payment of the amount E. J. Brown was to pay for the land. These issues were tried by the court and found for Barrett, and as there was abundant evidence to support that finding, we do not feel inclined to disturb it.

The question of law arising on the facts as found by the court, is, whether the plaintiffs have a lien upon the land, against Barrett, for the amount of the Smith note? That such a lien would have existed as between plaintiffs

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and E. J. Brown, is clear, but assuming, as found by the trial court, that Barrett was an innocent purchaser, does the fact that he took his deed from plaintiffs, instead of E. J. Brown, continue the lien, notwithstanding the plaintiffs, for that part of the purchase money which they now seek to charge upon the land, took the note and mortgage in question? Equity regards the substance rather than the form of a transaction. If an innocent purchaser had purchased of E. J. Brown and taken a deed from him, there would be no doubt that the original vendor could not enforce a lien for the Smith note against the land. It is well settled in this State, that taking collateral security for the purchase money of land will amount to a waiver of the lien, unless it is clearly shown that the intention was to reserve the lien. 40 Mo. 79; 47 Mo. 362; 49 Mo. 64; 66 Mo. 44; 67 Mo. 472. And such innocent purchaser cannot suffer in consequence of a failure of the original vendor to realize out of the collaterals the sum they were intended to secure, whether the collaterals were forged or affected with other infirmities which destroyed or impaired their value. The vendors had executed a deed conveying the land to E. J. Brown, and, instead of delivering this deed to E. J. Brown, for convenience it was withheld and plaintiffs conveyed directly to Barrett. On no principle of equity can Barrett, on the facts found, be regarded otherwise than as a purchaser from E. J. Brown. We are all of opinion that the judgment of the circuit court, which was in Barrett's favor, should be and it is, therefore, affirmed.

McCarty v. Cunningham.

McCARTY, *Appellant*, v. CUNNINGHAM.

Bill of Exceptions. To authorize the filing of a bill of exceptions in vacation there must be both consent of parties and an order of court permitting it. The one without the other will not be sufficient.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge.

AFFIRMED.

Harding & Buller for appellant.

Chas. A. Winslow for respondent.

NORTON, J.—Notwithstanding the positive injunction of the statute that exceptions must be filed during the term at which they are taken, and not after, it has been held by this court that a bill of exceptions may be filed after the expiration of the term, provided the parties consent thereto and the court so orders. *Robart v. Long*, 65 Mo. 223; *Peake v. Bell*, 65 Mo. 224; *West v. Fowler*, 59 Mo. 40. The bill of exceptions in this case was not filed during the term, and although the consent of parties that it might be filed in vacation appears, there is no order of court based upon such consent authorizing it to be done, and under the authority of the cases above cited, the bill of exceptions must be disregarded, as this is insisted upon in the first point made by respondent. This being done, there is nothing left for us to consider but the record proper, and as we find no error in it, the judgment will be affirmed. All concur.

Motion for rehearing overruled.

THE BOATMEN'S SAVINGS BANK, *Appellant*, v. COLLINS.

1. **Married Women : SEPARATE ESTATE.** It is settled law that a married woman possessed of a separate estate may bind it by giving her promissory note.
2. — : —. The words ordinarily used to create a separate estate are "to her sole and separate use;" but these are not essential. Any words clearly indicating the intention will suffice. The words: "To have and to hold * * unto the said S. L. B., her heirs, assigns and legal representatives, in fee simple absolute and in severalty forever," do not create such estate.
3. — : **PROMISSORY NOTE.** The promissory note of a married woman not possessed of a separate estate at the time she executed it, is a nullity.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

This was a suit brought against Collins as administrator of Mrs. Sarah L. Coleman (formerly Baker) to subject to the payment of several promissory notes executed by her during coverture, a tract of land conveyed to her before marriage by a conveyance, which contained the following habendum clause: "To have and to hold the above described lots of land, and each and every of them, with all the tenements, hereditaments and appurtenances thereunto belonging, unto the said Sarah L. Baker, her heirs, assigns and legal representatives, in fee simple absolute and in severalty forever." Plaintiff claimed that this clause created in Mrs. Coleman a separate estate, but the trial court held otherwise, and gave judgment for defendant, which was affirmed by the St. Louis court of appeals.

A. M. Gardner for appellant.

Collins & Jamison for respondent.

I.

SHERWOOD, C. J.—It has been held from an early period

in the judicial history of this State that a *femme covert* possessed of a separate estate might, by giving her promissory note, bind or charge such separate estate. *Coats v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Mo. 457; *Clafin v. Van Wagoner*, 32 Mo. 252; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weippert*, 46 Mo. 532; *Lincoln v. Rowe*, 51 Mo. 571; *Bank v. Taylor*, 62 Mo. 338. This is the generally prevalent doctrine, both in England and in this country. 2 Kent, 151; *Williams v. Urmston*, 35 Ohio St. 296; *s. c.*, 35 Am. Rep. 611; 2 Bishop L. Marr. Wom., §§ 202, 211, 214; *Ib.*, §§ 842, 855, 862, 872, and cases cited.

II.

The ordinary words used to create a separate estate in a married woman are "to her sole and separate use." Any equivalent words, however, will answer the same purpose, if the intention to create such an estate be clear. But nothing must be left to conjecture. In the present case there is absolutely nothing in the words employed giving the faintest indication of an intention to create a separate estate.

III.

This being the case, the notes of Mrs. Coleman are nullities and incapable of enforcement in equity; for the reason that there was no subject matter, to-wit: a separate estate, upon which they as a power of appointment could operate; therefore, judgment affirmed. All concur, except HENRY, J., not sitting.

ADAIR COUNTY V. OWNBY AND ELY, *Cross-appellants.*

1. **Appeal:** RES JUDICATA. A matter once expressly decided by this court cannot on a second appeal be again brought in question. It is *res judicata*.
2. **Receiver:** MUST ACCOUNT FOR PROFITS. It is undoubtedly true that a receiver will not be permitted to make any profit for himself out of his receivership, and if he make any, will be required to account to his *cestui que trust* for it; but there is in this case no evidence to which to apply this principle.
3. ———: SETTLEMENT OF ACCOUNTS: PRACTICE. Upon final settlement of the accounts of a receiver, he claimed the surplus remaining in his hands after the payment of all the debts, by virtue of an assignment to himself from the debtor, but the court below refused to try his right under the assignment, and ordered him to pay the surplus into court, to abide the further order of the court. *Held*, error. The questions arising upon the assignment should have been passed upon before the receiver was required to pay any money into court.

Appeal from Adair Circuit Court.—HON. J. W. HENRY,
Judge.

REVERSED

James Ellison for appellant Ely.

Harrington & Cover and *Hooper* for appellant Ownby.

NORTON, J.—It appears from the record in this case that Adair county instituted in the Adair county circuit court, a suit by attachment on the bond of Ownby, as county collector, and that on the 1st day of June, 1867, judgment was rendered in favor of the county for about \$6,000, and on the same day D. A. Ely, one of the sureties on Ownby's bond, was appointed receiver to take charge of the assets attached and out of them pay off said judgment. It also appears that said Ely, as receiver, paid off said judgment and undertook to settle with the court his accounts as receiver, and for this purpose made a report or statement of account, the correctness of which being drawn

in question, it was referred to a referee. Upon the coming in of the report of the referee, both parties, Ownby and Ely, filed exceptions thereto, which being heard and considered by the court, were in part sustained and in part overruled, and a judgment finally rendered against Ely, directing him to pay and deliver, on or before the first day of the next term of the court, to the clerk thereof, the sum of \$3,922.16, also all the uncollected assets of every kind in his hands as receiver, which money and assets were ordered to be held by the clerk till the further order of the court. Both Ownby and Ely appeal from the action of the court.

On the part of Ely it is insisted that error was committed by the court in charging him, as receiver, with three certain county warrants and interest thereon, received by him respectively from Chandler, Ringo and Smith, and in refusing to credit him with the whole amount of what is known in the history of this case as the Reed warrant instead of the sum paid to Reed to procure the warrant.

This case has heretofore been before this court on the very same evidence on which it is now here, and is reported in 59 Mo. 437, to which reference is here made for a full history of it. When this case was here before these same warrants were in controversy, and it was urged in that case that the court erred in not charging said Ely with the Chandler, Ringo and Smith warrants, and in not crediting him with the full amount of the Reed warrant, and it was upon that ground chiefly that the judgment was reversed, this court holding that the Chandler, Ringo and Smith warrants ought to have been charged to Ely and were not, and that he was only entitled to a credit for what the Reed warrant cost after first charging himself with the whole amount of it. When the case went back, the circuit court followed the directions of this court, and the obedience of that court to the mandate of this court is now assigned for error. It was expressly held when the case was here be-

1. APPEAL: RES JUDICATA.

Adair County v. Ownby and Ely.

fore "that the court erred in striking out the total amount of the Reed warrant and the warrants of Chandler, Ringo and Smith, which ought to have been charged to Ely, deducting the \$800 which he and his securities paid to procure from Reed the property turned over to them." As to these items the matter is *res judicata*, and under the ruling of this court the *nisi prius* judge could have made no other disposition of them, than was made.

It is also objected that the court erred in charging the receiver with \$620, interest on the amount in his hands.

While the principle contended for by counsel for Ownby, is undoubtedly correct, that a receiver will not be permitted to make any profit for himself in any of the concerns of the trust, and that when he deals with the trust estate for his own benefit, he shall account to the *cestui que trust* for all gain which he has made, we have been unable to discover the evidence that the receiver so dealt with the assets or estate received by him, or that he had made profit out of them. The referee did not so find, and refused to charge interest, and in this we think his finding was correct, and that of the court erroneous, and for this error the judgment will be reversed.

And inasmuch as the case will be remanded, and inasmuch as after the cause was remanded when it was here before, Ely was permitted to file a supplemental report, in which he claimed that under an assignment made to him by Ownby in 1869, he was entitled to all the assets which might be found to be in his hands as receiver after paying off and discharging the said judgment of the county obtained on the 1st day of June, 1867, we think his rights under said assignment should be passed upon by the trial court. This was not done when the case was retried, but instead thereof the court directed Ely to pay the amount ascertained to be in his hands as receiver to the clerk of the court to abide the further order of the court. This action must have been taken on the idea that Ely after such payment was made, might come

2. RECEIVER: must
account for profits

3. —: settle-
ment of account:
practice.

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in and contest the right of Ownby to the sum so paid. We can see no propriety in requiring Ely first to pay the amount in his hands to the clerk before he would be allowed to contest Ownby's right to it, and as the supplemental report brought the matter to the attention of the court, upon a rehearing the court will ascertain the rights of the parties under the said assignment, and if it should be found that Ely is entitled to what is in his hands as receiver, or any part thereof, the court should so order, and if it should be found that Ownby, notwithstanding said assignment, is entitled thereto, it should so order and thus end this protracted litigation.

Various exceptions were also taken as to the action of the court in allowing certain credits for attorney's fees and expenses to the receiver, which we deem it unnecessary to particularize further than to say, the charges, though liberal, might well have been allowed under the evidence. Judgment reversed and cause remanded, in which all concur.

CARPENTER, *Appellant*, v. JAMISON.

Receipt: PAROL EVIDENCE. So far as a receipt is a mere acknowledgment of payment, it is not conclusive; but if it is not a mere receipt, but constitutes and imports a contract, it is as any other written agreement, and cannot be contradicted or enlarged by parol testimony.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Wm. B. Thompson and Henderson & Shields for appellant.

*This syllabus is taken from 6 Mo. App. 216.

White v. McPheeters.

D. D. Burnes and Geo. W. Cline for respondent.

HENRY, J.—For the reasons assigned by the court of appeals in its opinion delivered in this case, the judgment of that court is affirmed. All concur.

WHITE V. MCPHEETERS, *Appellant*.

1. **Estate in Remainder:** LIABILITY TO EXECUTION: VOLUNTARY CONVEYANCE. A deed conveyed land in trust for the sole and separate use of A. (a married woman) for and during her natural life, remainder in fee simple in trust for J. (her husband) should he survive A., with covenants on the part of the trustee that upon the death of either A. or J., whichever died first, he would convey to the survivor, and if A. and J. at any time during their joint lives, should wish to sell, then that he would, upon their joint request in writing, convey to any person designated by them, and pay over the purchase money to A., or invest the same in other property to be held upon like trusts, as A. and J. might direct.

Held, that the deed created in J. an equitable estate in remainder in fee, but whether the remainder was vested or contingent the court did not deem necessary to decide. Whichever it was, it was liable to be taken in execution.

Held, also, that the covenant of the trustee as to selling and paying the proceeds to A. did not amount to a reservation of a right in A. to defeat J.'s estate, since the trustee was to act only upon the joint request of A. and J.

Held, also, that a voluntary conveyance by J. of his interest was ineffectual as against his creditors.

2. ———: CONVEYANCE BY MISTAKE: TRUSTS. If a husband having an estate in remainder in his wife's lands, without intending to convey his interest, join her in executing a deed in fee, a trust will arise in his favor which can be enforced against the grantee at the suit of the husband's creditors.
3. **Fraudulent Conveyances.** A voluntary conveyance by an insolvent debtor is fraudulent as against creditors, though no fraud was in fact intended.

White v. McPheeters.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON,
Judge.

AFFIRMED.

Thos L. Anderson and W. P. Harrison for appellants.

The claim of Mrs. McPheeters to the property, and its proceeds, if sold, was superior to that of the creditors of Joseph H. It was purchased with her money, and the creditors of her husband had no claim, legal or equitable, to it, or to property in which it might be invested. Joseph H. McPheeters had no interest in the property by virtue of the deed of trust to Jno. T. Redd, except a contingent one. His interest was not vested; it was contingent, dependent on the will and act of Ann W. If she chose to sell the property during her life, she could, by the express terms of the deed, do so; and when sold, the proceeds were to be held for her sole use. Under the power reserved by her in the deed, she made the sale to Whaley, and this determined the contingent interest of Joseph H. In the deed of trust to Redd, the grantor, Ann W., conveys her own property (in effect a voluntary gift) to be held in trust for her use for life, with remainder in fee to her husband, subject, however, to the contingency of her being the longest lived, and in the event of his death before that of the grantor, then to be held in trust for her. And further, should the said Ann W. and Joseph H., during their joint lives wish to sell, then, she may do so, and the trustee is to convey to the purchaser by them designated. 2 Wash. Real Prop., 224.

Chas. A. Winslow also for appellants.

John T. Redd for respondents.

1. The deed created in Joseph H. McPheeters an estate in remainder in the equitable fee. 1 Hill. Real Prop.,

(3 Ed.) p. 512, § 1; 2 Wash. Real Prop., (3 Ed.) pp. 500, 501; 4 Kent Com., (5 Ed.) 197, 198. A vested, not a contingent remainder. 2 Wash. Real Prop., 502, 506, 509, 526; 4 Kent Com., 201, 202, 203, 205; *Aubuchon v. Bender*, 44 Mo. 566; *Hill Trustees*, 524, 525; *Clapp v. Stoughton*, 10 Pick. 463; *Stone v. Massey*, 2 Yeates (Pa.) 369; *Ives v. Legge*, 3 T. R. 488n; *Doe v. Perryn*, 3 T. R. 488.

2. The remainder in fee in Joseph H. McPheeters, whether vested or contingent, by his deed of July, 1873, passed to and vested in Edward Whaley, and by the deed of Whaley and wife passed to and vested in Mrs. McPheeters, and by her will passed to and vested in defendants Susan and Ann W. Whaley. 2 Wash. Real Prop., 512, § 20, 522, § 4; 4 Kent Com., 261. It is subject to alienation by statute. Gen. St. 1865, p. 444, § 1; *Ib.*, p. 528, § 1. It was subject to the payment of McPheeters' existing debts when he conveyed to Whaley. Gen. St. 1865, p. 636, § 1.

3. The conveyance by Joseph H. McPheeters of his estate in remainder to Edward Whaley, being, as shown by his testimony and the testimony of Whaley, without consideration, and the facts being admitted that said conveyance included all his real estate, and that he was largely indebted, and that the deed was voluntary, the law presumes that he made it with the intent to hinder, delay and defraud his existing creditors, and it was void under the provisions of 13th Eliz., chap. 5, as to existing creditors, and under 27th Eliz., chap. 4, was void as to subsequent purchasers. Under sections 2 and 3 of chapter 107, of General Statutes 1865, such a deed is declared void as to both creditors and purchasers, prior and subsequent. Gen. St. 1865, p. 439; *Townshend v. Windham*, 3 Ves. Sr. 243; *Potter v. McDowell*, 31 Mo. 69; *Pepper v. Carter*, 11 Mo. 544; *Robinson v. Robards*, 15 Mo. 466; *Reed v. Pelletier*, 28 Mo. 177; *Gamble v. Johnson*, 9 Mo. 597; *Payne v. Stanton*, 59 Mo. 160; 1 Story Eq., §§ 353, 354, 355, 357, 359; *Boyd v. Dunlap*, 1 John. Ch. 483; *Reade v. Livingston*, 3 John. Ch. 500; *Bayard v. Hoffman*, 4 John. Ch. 452; *Wood v. Jackson*, 8 Wend.

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9; *Sexton v. Wheaton*, 8 Wheat. 229; *Gilmore v. Land Co.*, Peters C. C. 460. The deed having been, in contemplation of law, made with the intent to hinder, delay and defraud existing creditors, Whaley, the grantee, took the estate in remainder, subject to a trust in favor of the existing creditors. *Bobb v. Woodward*, 50 Mo. 101; *Herrington v. Herrington*, 27 Mo. 560; 1 Story Eq., §§ 350, 449; 2 Story Eq., §§ 980, 1265. If McPheeters did not contract to sell to Whaley, and Whaley did not contract to purchase from him, his interest in the property, and if the deed of July 23rd, 1873, was not intended by the parties to pass any interest in the land except the interest of Mrs. Ann W. McPheeters, and if Joseph H. united with her in said deed for the sole purpose of enabling her to convey her interest, then the remainder of Joseph H. unintentionally and by mistake passed by said deed to and vested in Whaley subject to an implied trust in favor of McPheeters, and, a *fortiori*, in favor of his existing creditors. *Hill Trustees*, 206; *Ramsden v. Hylton*, 2 Ves. Sr. 225; 1 Story Eq., §§ 143, 144, 145; 2 Story Eq., §§ 1195, 1219.

NORTON, J.—This suit, which is a proceeding in equity in the nature of a creditor's bill, to subject to sale for the payment of certain debts of Joseph H. McPheeters, mentioned in the petition, block 74 in the city of Palmyra, was instituted in the Marion county circuit court, and being transferred from the said court, by change of venue, to the Macon county circuit court, was there tried and a decree granting the prayer of the petition was rendered, from which defendants prosecute their appeal to this court.

The following are undisputed facts in the case, viz: The said real estate was originally owned by Joseph H. McPheeters, who, in 1864, conveyed the same to his wife, Ann W. McPheeters, in consideration of \$2,100, which came to his said wife as her separate property from her father's estate. In April, 1865, Mrs. McPheeters, her husband joining with her, conveyed the said real estate to

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John T. Redd, as trustee, which, after omitting the formal parts of the deed, contained the following provisions, viz :

“To have and to hold to the said party of the first part, and his heirs forever, upon the following trusts: 1st. In trust for the sole and separate use of the said Ann W. McPheeters, for and during her natural life. 2nd. Remainder in fee simple in trust for the said Joseph H. McPheeters, should he survive the said Ann W. McPheeters, in which event the said party of the first part covenants that he will execute and deliver to the said Joseph H. McPheeters a deed conveying to him the legal title to said real estate, as fully as the same may be held by him under the terms of this deed; but should the said Ann W. McPheeters survive the said Joseph H. McPheeters, then the said party of the first part shall hold said property in fee in trust for the said Ann W. McPheeters; and should the said parties of the second part, at any time during their joint lives, wish to sell said real estate, then said party of the first part covenants that he will, upon the joint request of the said parties in writing, execute and deliver a deed conveying said property to any person or persons designated by them, and pay over the purchase money to the said Ann W. McPheeters, or invest the same in other property, to be held upon like trusts, as said parties of the second part may direct; and the said party of the first part covenants, to and with the said parties of the second part, that he will, in good faith, execute the trust reposed in him.”

None of the debts embraced in the petition were in existence at the time of the execution of said deed to Redd, but all of them were contracted subsequently between the date of said deed and July, 1873, when Joseph H. McPheeters and Ann W., his wife, joined in a conveyance of the property to Robert Whaley, who, in consideration thereof, paid \$100, and executed three notes then and there for \$1,000 each, and one for \$900, payable in one, two, three and four years. These notes were made payable to

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Ann. W. McPheeters, and in December, 1873, the contract for the sale of the land was rescinded, and Whaley's notes were surrendered; whereupon Whaley and his wife executed a deed conveying said real estate to Mrs. McPheeters in fee for her sole and separate use, Redd, in the meantime, upon the written request of McPheeters and wife, having conveyed the fee to said Whaley. At the time of the conveyance to said Whaley, McPheeters was insolvent and had no other interest of value except his interest in the land conveyed, and owed the debts mentioned in the petition, upon two of which suits had been brought against him, and upon which judgments were rendered soon after the said conveyance was made. Mrs. McPheeters died in 1876, leaving a will, in which she devised the real estate in question to Susan Whaley and Ann W. Whaley, two of the defendants. It also appears from the evidence of both said McPheeters and Whaley that the conveyance made to Whaley in 1873 by McPheeters and wife, was entirely voluntary and without consideration, so far as said Joseph McPheeters was concerned. Whaley testified that he never bought, and McPheeters testified that he never sold his interest, both of them stating that they were of the opinion that he had no interest to sell.

The questions which grow out of the above state of facts are: First, Did McPheeters, in virtue of the deed of trust executed to Redd, have such an interest in the real estate in question as could be subjected to sale for the payment of his debts. Second, If he had such an interest, was the conveyance made by McPheeters and wife in 1873 to Whaley effectual to pass it, so that McPheeters' creditors, he being insolvent, could not subject it to sale for the payment of his debts. An affirmative answer to the first and a negative answer to the second question affirms the judgment, and an affirmative answer to the second or a negative answer to the first question reverses it.

We think it clear that, by the terms of the deed of trust to Redd, it created an estate in remainder to the equi-

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1. VESTED IN REMAINDER: liability to execution: voluntary conveyance. table fee in McPheeters. The legal estate was to be held by the said trustee for the sole and separate use of Mrs. McPheeters during her life, and the remainder in fee simple in trust for the said Joseph H. McPheeters, should he survive Mrs. McPheeters, in which event the trustee covenanted to convey the legal estate to said McPheeters, but should Mrs. McPheeters survive her husband, then the trustee was to hold the property in fee for her. Whether the estate in remainder thus created was vested or contingent it is not necessary to determine, since in either case the interest of said Joseph H. McPheeters was an alienable interest, and, therefore, subject to sale under execution.

Mr. Washburn, in his work on real property, at section 4, page 562, observes: "For a long time a contingent remainder was not supposed to be the subject of alienation, because it was rather a possibility than an estate, like the possibility of an heir at law, for instance, having the estate when his ancestor shall have died. But it is now settled that when the contingency upon which the remainder is to vest is not in respect to the person, but the event, when the person is ascertained who is to take if the event happens, the remainder may be granted or devised and the grantee or devisee will come into the place of the grantor or deviser with his chance of having the estate. But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder. See also 4 Kent Com., pp. 470, 472; *Reinders v. Koppelman*, 68 Mo. 482. Under our statute, which declares that the term "real estate" as therein used shall include all estates and interests in land, and that all real estate, whereof a defendant shall be seized either in law or equity, shall be subject to seizure and sale under execution, the interest of said McPheeters in the real estate in controversy, whether it be regarded either as a vested or contingent remainder, was liable to be subjected to the

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payment of his debts. It, therefore, follows that the first question above stated must be answered in the affirmative.

It is, however, earnestly insisted by counsel, that in the said deed of trust to Redd, Mrs. McPheeters reserved a power of disposition or sale of the land in herself, the execution of which necessarily destroyed the remainder created in her husband, and that the power having been actually executed in the sale to Whaley, destroyed whatever interest the creditors of McPheeters may have acquired, inasmuch as they could acquire no greater interest than McPheeters had under the deed, and which was subject to be defeated by the same contingency, and that, therefore, a negative answer should be returned to the question. The position thus taken has been pressed upon our attention in an ingenious and plausible argument, but the unsoundness of it consists in the assumption that Mrs. McPheeters reserved power in herself to destroy the estate created in her husband by a sale of the property and the appropriation of the proceeds of a sale to her own use. No such power as this was reserved in the deed. It simply provides that should McPheeters and wife, at any time during their joint lives, wish to sell said real estate, then Redd, the trustee, covenants that he will, on the joint request of said parties in writing, execute and deliver a deed conveying said property to any person or persons designated by them, and pay over the purchase money to the said Ann W. McPheeters, or invest the same in other property to be held upon the like trusts, as said parties of the second part may direct. It is evident, we think, that this provision of the deed required the joint action of both McPheeters and wife to effect a sale, and that only upon their joint action and by their joint consent, could the trustee convey to a person designated or pay the proceeds of a sale to Mrs. McPheeters. The deed contained no provision for the destruction of the estate in remainder of McPheeters, but simply devised a method for the sale of the entire estate when both parties interested in the beneficial interest desired it, and

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imposed an obligation on the trustee to convey, on their written request, the entire estate, (the life estate being in Mrs. McPheeters, and the remainder in fee in him,) and to any person to whom the parties thus interested might jointly sell it.

It thus having been shown that the interest of said McPheeters was answerable for the payment of his debts, the question remains, was the conveyance to Whaley effectual to pass this interest so as to prevent creditors from reaching it and subjecting it to the payment of their demands? This question, we think, must be answered in the negative, for the reason that according to the testimony of both McPheeters and Whaley the conveyance of his interest was voluntary and without consideration, and could not, therefore, deprive the creditors of McPheeters from following such interest, he being at the time insolvent.

Nor does it make any difference that Whaley did not intend to buy nor McPheeters to sell his interest. If the deed in fact, contrary to the intention of the parties, conveyed his interest, a trust arose in favor of the grantor which "will be enforced on the conscience of the parties to accomplish the ends of justice." 1 Story Eq., §§ 143, 145; *Smith v. Walser*, 49 Mo. 251.

Nor does it make any difference that McPheeters joined in the conveyance not contemplating any fraud upon his creditors. He being at the time insolvent, and in debt, and the deed being voluntary, was as to his creditors fraudulent. In the case of *Potter v. McDowell*, 31 Mo. 69, it is said: "When a voluntary deed is made by a debtor in embarrassed circumstances, and a question arises as to its validity, in order to render the deed fraudulent in law as to existing creditors, it is not necessary to show that the debtor contemplated a fraud in making it, or that it was an immoral or corrupt act; the law does not concern itself with the secret motives which may influence the debtor; he may believe he had the right to make it, and that it was his duty to do it, yet if the

2. —: convey-
ance by mistake:
trusts.

3. FRAUDULENT
CONVEYANCE.

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deed is voluntary, and hinders and delays his creditors, it is fraudulent." If this presumption needed strengthening, the evidence in this case furnishes abundant support to it, when the fact is considered that the deed to Whaley was made while two suits brought against McPheeters by two of the plaintiffs were pending, and just a few days before judgments were rendered against him, in connection with the further fact that the contract with and deed to Whaley were cancelled five months afterward and a re-conveyance of the entire estate made to Mrs. McPheeters for her sole and separate use.

We think the judgment was for the right party, and we hereby affirm it, in which all concur.

Motion for rehearing overruled.

SCHNEIDER V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

1. **Negligence:** PLEADING. In an action for negligence the petition need not specify the particular act complained of. If it does, no other can be proved. But a general averment of negligence will be sufficient.
2. —: EVIDENCE: RAILROAD. Under a general averment that the defendant, a railroad company, negligently killed plaintiff's animal, evidence was received that the killing took place at a public crossing, and that neither the whistle was sounded nor the bell rung on the locomotive which did the damage, as it approached the crossing. *Held*, no error.

Appeal from Pettis Circuit Court.—HON. WILLIAM T. WOOD,
Judge.

AFFIRMED.

Thos. J. Portis and E. A. Andrews for appellant.

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HENRY, J.—This suit was to recover damages for the killing of a horse by defendant's locomotive engine and cars, and the petition alleges that: "Defendant so carelessly and negligently ran and managed its locomotive engine and cars, on its railroad, as to run against and over said horse, thereby killing him." Defendant objected to any evidence on the part of plaintiff, "because the petition does not state facts sufficient to constitute a cause of action." This objection was overruled. That the petition is sufficient in such a case, has been repeatedly held by this court. *Meyer v. Atlantic & Pacific R. R. Co.*, 64 Mo. 542; *Goodwin v. R. R. Co.*, ante, p. 73. These cases are distinguishable from *Waldhier v. R. R. Co.*, 71 Mo. 514. That was a suit by an employe against the company to recover damages for personal injuries, and the petition alleged specifically wherein defendant was negligent, and yet plaintiff was permitted to recover for negligence other than that specifically assigned. This was held by this court to be error.

The appellant also complains that the court permitted plaintiff to introduce evidence to show that the horse was killed at a public crossing, and that neither the whistle nor bell of the locomotive was blown or rung, as required by the statute. The appellant contends that as this action is not based upon that section the court erred in admitting evidence of a disregard of its provisions by the defendant's employes. This precise question was passed upon in the case of *Goodwin v. R. R. Co.*, supra, in which we held the evidence admissible. All concurring, the judgment for plaintiff is affirmed.

The State v. Butterfield.

THE STATE V. BUTTERFIELD *et al.*, Plaintiffs in Error.

1. **Burglary:** INSTRUCTIONS. Where the evidence given in a prosecution for burglary made it impossible for the jury not to conclude that the window through which defendant effected an entrance was an outside window; *Held*, that it was not essential for the trial court specially to instruct the jury that they could not convict unless they found this fact.
2. **Larceny.** Stealing in a dwelling house is made grand larceny by statute, irrespective of the value of the property stolen. R. S. 879, § 1309. See *State v. Brown*, *post*, p 317.
3. **Burglary and Larceny:** VERDICT. A verdict in a prosecution for burglary and larceny declared defendants "guilty in manner and form as charged in the indictment," and assessed the punishment, but failed to say of which offense the defendants were found guilty. *Held*, that it was nevertheless good.
4. **Larceny.** Recent possession of the property stolen, unless satisfactorily explained, is *prima facie* evidence of guilt.
5. **Practice, Criminal:** INSTRUCTIONS. On the trial of a criminal case, the court gave an instruction for defendant which was erroneous and in conflict with a correct instruction given for the State. The error was in favor of the defendant. *Held*, that it afforded no ground for reversal.
6. ———: ———. In a criminal case it is a matter of discretion with the trial court whether to permit the jury to take the instructions with them to the jury room or not.
7. ———: ———: WITNESS. The contumacy of a witness in persisting in answering a question after the court has ruled it out, furnishes no ground for reversal when the court has expressly instructed the jury to disregard the answer.

Error to Saline Criminal Court.—HON. JOHN E. RYLAND,
Judge.

AFFIRMED.

Boyd & Seabee for plaintiffs in error.

D. H. McIntyre, Attorney General, for the State.

RAY, J.—The defendants were indicted in the criminal court of Saline county, for burglary and larceny in the same count of an indictment. The indictment charges

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that defendants "feloniously and burglariously broke into and entered the dwelling house of one W. P. Walton, in which there was at the time a human being, by forcibly bursting and breaking the window of said dwelling house, with intent then and there feloniously and burglariously to steal, take and carry away certain goods and chattels, then and there being in said dwelling house; and one overcoat, of the property of John Holland, of the value of \$20, and one overcoat of the value of \$30 and one basket of provisions of the value of \$5, of the property of W. P. Walton, in said dwelling house then and there being found, did feloniously and burglariously take, steal and carry away, against the peace and dignity of the State."

The evidence given at the trial tends to show that on the night of the 5th of March, 1881, the dwelling house mentioned in the indictment was broken into and entered by some parties, by forcibly bursting and breaking the rear window of said dwelling; that a plank had been nailed on said window, which also had inside fastenings. On the morning of the 6th this plank was found to have been taken off and the window broken open. It further appeared that said dwelling house, at the time, was owned and occupied by said Walton as a hotel, also, which was called the "City Hotel." The evidence also tends to show that the two overcoats and basket of provisions, mentioned in said indictment, were, on the night in question, in the office of said hotel or dwelling house; and that, on the morning of the 6th, they had disappeared therefrom, and could not be found anywhere, in or about the same; and that the rear window of said hotel had been burst and broken open, as aforesaid. The evidence also tends to show that said overcoats were of the value of \$30. It appears also that, on the night of the burglary and larceny in question, the defendants were seen together in Brownsville, on several occasions and at several places. They were first seen, by the city marshal, about nine or ten o'clock that night. Then they were next seen by him in

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the saloon in Central Hotel, on Main street; and after that they were seen about twenty minutes after twelve o'clock that night on the corner of Miller and Main streets, about 100 yards from the City Hotel, and going toward said hotel and toward the road to Lexington. Afterward, on the morning of the 7th of March, 1881, the defendants made their appearance at one of the hotels in Lexington, about thirty-five miles from Brownsville. They came together and took breakfast at the hotel in question. Butterfield had the two overcoats in question and left them in the hotel office. He, Butterfield, claimed both coats, and left one of them as security for their bill. On that afternoon, about two or three o'clock, the city marshal of Lexington arrested both the defendants at a house of prostitution in that city, and asked them where their overcoats were. They said they had none. The marshal then asked one of the women in the house for defendants' overcoats, and she gave him one of the coats. The marshal asked Butterfield whose coat that was. He said it was his. The marshal then took the defendants and went to the hotel and got the other coat. Butterfield told the Lexington marshal that he did not go into the Walton Hotel. He said he left Brownsville, and Moore caught up with him, and had the overcoats. As they were going into the Lexington hotel office, the marshal saw Butterfield drop a pair of gloves. He picked them up and asked Butterfield why he dropped the gloves. He replied that he did not want to be caught with them. The marshal afterward gave the gloves to Walton, who claimed them in the presence of the defendants. On the 7th or 8th of March, 1881, John DeLong, the city marshal of Brownsville, went to Lexington after the defendants, and brought them back to Brownsville. While in the custody of DeLong the defendants said they were "Butterfield and Moore." Butterfield said Macon Moore overtook him between Brownsville and Concordia, with the coats. Moore said they did not walk very fast between Brownsville and Concordia, because Butterfield

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had a sore heel. Butterfield said Moore brought the coats to him. These overcoats were fully identified as the property of Holland and Walton, and as the same overcoats that were in the City Hotel at Brownsville on the night of the burglary and larceny, and that disappeared therefrom on that occasion. The defendants would not tell where they got the overcoats, except as above. The Brownsville city marshal asked them where they got the coats, and they replied, they did not do business that way. They did not want to talk much.

It also appears, that in the progress of the trial, the State introduced as a witness W. M. Todd, who testified that he was yard-master of the State penitentiary at Jefferson City. The State then asked the witness the following questions: 1st. "Have you ever seen the defendants?" The defendants objected to the question; but their objection was overruled by the court, and the witness answered: "Yes, I have seen them." 2nd. "What are their names?" The defendants objected to this question also, but the court overruled the objection, and the witness answered: "Their names are Mathew C. Williams and Cornelius Drums." 3rd. "How do you know?" This question was also objected to, the objection overruled, and the witness answered: "Because I have seen them before." 4th. "Where did you see them?" This question was also objected to by the defendants, and the court sustained the objection; but the witness, before he was stopped, said that he had seen them as convicts, in the Missouri penitentiary; that he had turned defendant Butterfield out on the 14th of February last, and the defendant Moore on the 1st of March, 1881. The defendants duly excepted to these adverse rulings of the court, and also to the answer of the witness; and especially to the answer to the last question, which the witness proceeded to give notwithstanding his objection was sustained by the court. This was all the testimony.

The court, at the instance of the State, gave the fol-

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lowing instructions, over the objections of the defendants, to-wit :

1. If the jury believe from the evidence that the defendants, at any time within three years prior to the finding of the indictment in this case, to-wit : March 28th, 1881, at the county of Saline, State of Missouri, broke and entered the said dwelling house of William P. Walton, by forcibly breaking and bursting the window, in which there was at the time a human being, with the intent of stealing and carrying away any goods, wares, merchandise or other property then being in said dwelling house, then they will find the defendants guilty of burglary in the first degree, and assess their punishment at imprisonment in the State penitentiary for a term of years not less than ten. The breaking of the window by pulling off the plank and undoing the fastening is a forcible bursting and breaking within the meaning of the statute.

2. If the jury believe from the evidence that in committing the burglary the defendants also took and appropriated to their own use any of the property as described in the indictment and testified to by the witnesses, then the jury will find the defendants guilty of grand larceny, and in addition to the punishment for burglary, they will assess their punishment at imprisonment in the penitentiary for a term of years not less than two nor more than seven.

3. The court instructs the jury that the recent possession of stolen property, unless satisfactorily explained, is *prima facie* evidence of guilt.

4. If the jury have a reasonable doubt of the defendants' guilt, they should acquit; but such a doubt, to authorize an acquittal, should be a real and substantial doubt touching their guilt under all of the evidence, facts and circumstances detailed in evidence, and not a mere possibility of their innocence.

5. Although the jury may believe from the evidence that only one of the defendants, Macon Moore, actually broke and entered the house, yet if they further believe

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that the other defendant was present and in any manner was aiding, assisting, advising, procuring, counseling or abetting in said breaking and entering, then said other defendant is equally guilty as though he had actually broken and entered the house.

The following instructions were given on the part of the defendants :

1. Although the jury may believe from the evidence that a burglary and larceny was committed at the residence of W. P. Walton, in Brownsville, and that shortly after its commission a part of the property stolen was found in the possession of the defendants, yet such facts alone, uncorroborated, are insufficient to establish the guilt of defendants, either as to burglary or grand larceny; and unless the jury believe from the facts and circumstances testified to by witnesses in addition to the facts above stated that the defendants broke into the hotel or dwelling house referred to by witness, and took, stole and carried away property of value, they must find for defendants.

3. The law presumes defendants innocent, and the burthen of proof is upon the State, and in order to a conviction the evidence must be strong enough as to every material fact constituting the offenses charged, to exclude every reasonable doubt of the guilt of defendants, but such doubt must be a real and substantial doubt of defendants' guilt—and not a mere possibility of their innocence.

4. Even though the jury may believe from the evidence that defendants were formerly in the penitentiary as convicts, and are bad men, they are specially instructed that such facts are not to be considered by them in determining the question of guilt or innocence of the offenses charged in this case, and if the jury are not satisfied from all the circumstances in evidence in the case, independent of such facts, that defendants committed the particular offenses charged in the indictment, they must acquit.

These instructions were read to the jury, but it appears that the court failed and refused to permit the jury

to have said instructions in their room when they retired to consider their verdict. It also appears that the jury, after retiring and considering of the verdict, returned into court the following verdict: "We, the jury, find the defendants guilty in manner and form as charged in the indictment, and assess their punishment at imprisonment in the State penitentiary for a term of twelve years."

It is insisted, for defendants, that the first, second and third instructions given on the part of the State are erroneous. The first, in that it does not instruct the jury that in order to find the defendants guilty of burglary in the first degree, they must believe that it was an outer window that was broken. The second, in that it assumes that the burglary was committed, and that the defendants were the guilty parties; and compels the jury, if they find the defendants guilty of larceny, to assess their punishment for both burglary and larceny, even if the jury find not guilty on the charge of burglary, and does not permit the jury to find the defendants guilty of larceny alone. The third, in that it weighs and comments on the evidence, is misleading and in conflict with the first instruction given for the defendants, and that the doctrine it asserts is plainly erroneous. It is also contended for defendants that the verdict of the jury is a nullity, because it is a general verdict and does not specify which of the offenses the defendants are found guilty; and that the evidence in the cause is not sufficient to support the verdict. It is also further objected that the court erred in refusing to permit the jury to have the instructions while considering of their verdict. And lastly, it is maintained that it was error in suffering the witness, Todd, to proceed with his statement, after the objection to the question had been sustained by the court. We will examine these objections in their order and see if any of them are well taken.

In the first place it must be observed that section 1292 of the Revision of 1879, defines burglary in the first degree as charged in this indictment. Section 1300, of the same

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statute, fixes its punishment by imprisonment in the penitentiary at not less than ten years. The crime of grand larceny is defined by sections 1307 and 1309 of the same act, and its punishment, in a case like that charged in this indictment, is fixed by like imprisonment in the penitentiary not exceeding seven years. It will be observed also that section 1301 of the statute, reads as follows: "If any person, in committing burglary, shall also commit larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment, and, on conviction of such burglary and larceny, shall be punished by imprisonment in the penitentiary, in addition to the punishment hereinbefore prescribed for burglary, not less than two nor exceeding five years."

From the indictment in question and the evidence in support thereof, we think it clear that the objection to the first instruction is not tenable. The indictment charges that the dwelling house or hotel, was broken into and entered by forcibly bursting and breaking the window of said dwelling. The evidence speaking of the window thus burst and broken, calls it the rear window of the hotel. There is absolutely nothing in the testimony, or the description of the building, that gives the slightest color to the suggestion that the window in question was an interior window, or that the building had any but outside windows. Under the facts of the case, there was, therefore, no need that the jury should be expressly told that they must believe the window in question was an outside window, as they could not under the testimony believe otherwise.

The objection to the second instruction, under the facts and law of this case, is manifestly untenable. Inasmuch as the subject matter of the second instruction is embraced in that of the first; and, inasmuch as the larceny, if committed as charged, was perpetrated in the commission of the burglary; and, inasmuch as both offenses, by virtue of section 1301, *supra*, are blended in

1. BURGLARY: in instructions.

2. LARCENY.

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the same count of the indictment, the two instructions may well be taken and considered together; and in such case it is not error to instruct the jury, as they were told in this second instruction. By virtue of section 1809, *supra*, "stealing in a dwelling house is made grand larceny, irrespective of the value of the property stolen." See *State v. Ramelsburg*, 30 Mo. 26, and *State v. Smith*, 30 Mo. 114.

And in this connection we may here add that in such a case the verdict rendered by the jury in this case is sufficient and proper, and furnishes no cause for a reversal. And it may be further added, that there can be no question but that the evidence in the case was amply sufficient to support the verdict so rendered.

The propriety of the third instruction is not an open question in this State. The rulings of this court in *State v. Robbins*, 65 Mo. 443, and the still more recent case of the *State v. Kelly*, 73 Mo. 608, and cases cited, must be accepted as decisive of this case on that point.

And it may be added, in this connection also, that if proper instructions are given, in a criminal case, the judgment will not be reversed for the giving of others which are erroneous if they are harmless. The giving, therefore, of the first instruction for defendants, although erroneous, (being harmless and in their favor,) did not invalidate the third instruction given for the State. *State v. Hopper*, 71 Mo. 425.

The refusal of the court to permit the jury to take the instructions with them, when they retired to consider of their verdict, furnishes no cause for a reversal of this case. Section 3355 of the Revision of 1879 regulates and is limited to the practice in civil cases, and its provisions are not extended to criminal cases, by operation of sections 1906 and 1908 of criminal procedure. In the case of the *State v. Tompkins*, 71 Mo. 613, it is held that "in criminal cases, the trial court may, in its discretion,

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permit the jury to take with them to their room the instructions and documentary evidence at the trial." Under the authority of that case, the sending or withholding the instructions from the jury, when they retired to consider of their verdict, in a criminal case, is a matter within the discretion of the trial court; and as there is no evidence, in this case, of an abuse of that discretion, the action of the court in that particular is no cause for a reversal.

The only remaining objection urged as a reason for the reversal of this cause, when examined, is based upon 7. _____: _____: the continuous conduct of the witness, Todd, witness. in persistently answering a question, after an objection to it had been sustained by the court, rather than any erroneous rulings of the court in reference to said questions and answers. Under such circumstances, the most the court could do to correct the irregularity was to instruct the jury, as it did, to disregard the testimony of said witness in that behalf. Such misconduct of a witness furnishes no cause for a reversal of the judgment of the court. The case of the *State v. Rothschild*, 68 Mo. 52, and cases cited, which is relied on by defendants, in support of this last objection, is so unlike the present case, and the conduct and action of the court in that case, so different from that of the court in this instance, that it can scarcely be considered an authority in this case.

No error, therefore, appearing upon this record, the judgment of the trial court is affirmed. All the judges concur.

Lackland v. Smith.

LACKLAND V. SMITH *et al.*, Appellants.

Practice: REMANDING WITH SPECIFIC DIRECTIONS. When an intermediate appellate court remands a case with specific directions, and no appeal is taken from this judgment, and the trial court conforms its action to the judgment, upon a second appeal the Supreme Court will hold the judgment conclusive. See *Adair County v. Ownby*, ante, p. 282.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Castleman & Gibson for appellants.

Martin & Lackland for respondent.

SHERWOOD, C. J.—We are precluded from any examination into the merits of this cause, for the reason that when the cause came the first time up to the St. Louis court of appeals, that court reversed the judgment of the circuit court and sent the cause back with specific directions to that court, how to proceed. No appeal was taken from the judgment of the court of appeals, and consequently the judgment stands in full force to-day. The circuit court has conformed its action in the premises to the mandate of the court of appeals, the latter court has affirmed that judgment, and it only remains to say that on the authority of *Chouteau v. Allen*, 74 Mo. 56, and cases cited, we affirm the judgment of the court of appeals. All concur.

Seibold v. Christman.

SEIBOLD *et al.*, Appellants, v. CHRISTMAN.

1. **Husband and Wife: TRUSTS.** When a husband purchases real estate with his own money and causes the conveyance to be made to his wife, there is no presumption of a resulting trust, but *prima facie* this is a provision for the wife.
2. ———: ———: **EVIDENCE.** Evidence of declarations and of acts of the wife is competent to show that the intention of the parties was that the wife should hold for the husband; and the finding of the jury as to the fact is conclusive.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Fredk. Gottschalk for appellants.

Bland & Schnaake for respondent.

NORTON, J.—This is an action of ejectment to recover possession of a certain lot in the city of St. Louis, which being tried, judgment was rendered for the defendant, which on the appeal of plaintiffs to the St. Louis court of appeals, was by that court affirmed, from which plaintiffs have appealed to this court. The cause is reported in 7 Mo. App. 254, where a full statement of it is given. After a careful examination of the record, the authorities to which we have been cited by counsel, and the facts of the case as shown by the evidence, we are satisfied that the judgment should be affirmed, and for the reasons given in the opinion rendered by said court. Judgment affirmed, in which all concur.

*These syllabi are taken from 7 Mo. App. 254.

STICKFORD v. THE CITY OF ST. LOUIS, *Appellant.*

1. **Damages: ACTION.** The various forms or subjects of injury sustained from a single wrongful act, do not multiply the causes of action.
2. ———: **PLEADING.** In an action of damages against a municipal corporation for an injury to property caused by a change of grade of a street, when the plaintiff owns the fee of one lot, and a leasehold with rent of the adjoining lot, he may sue in one count for the damage to both.
3. ———: **MUNICIPAL CORPORATION.** The charter provision of 1870 that the city shall be liable for damages sustained by property owners by reason of any change of the grade of a street, applies to a case where the change does not extend to the whole width of the road-bed, if the alteration is such as to raise or lower the principal current of travel and transportation.
4. ———: ———. The recovery is not confined to such damage as results from some physical injury to the buildings; it is enough that a depreciation in value results from the change of grade.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

Seneca N. Taylor for respondents.

HENRY, J.—The judgment of the court of appeals is affirmed for the reasons assigned by that court in its opinion delivered therein. All concur.

*These syllabi are taken from 7 Mo. App. 217.

Priest v. Watson.

PRIEST V. WATSON, *Appellant*.

Negotiable Paper: RELEASE OF MAKER: EFFECT ON ACCOMMODATION INDORSER: EXECUTION. The holder of negotiable paper having recovered judgment thereon against the maker and caused execution to be levied on property of the maker sufficient to pay the debt afterward released the levy. *Held*, that he thereby released from liability one who was holden on the paper as accommodation indorser.

Appeal from St. Louis Court of Appeals.

REVERSED.

H. A. & A. C. Clover for appellant.

The obligation of the indorser of a promissory note is in the nature of that of a surety for the performance of the act of the promissor. Chitty on Bills, (13 Am. Ed. No. 411) 463; *Clarke v. Devlin*, 3 Bos. & P. 363; *Wallace v. McConnell*, 13 Pet. 136; *Blair v. Bank*, 11 Humph. 84; 2 Daniel Negot. Instr., p. 292, § 1303; Edwards on Bills, 293; Byles on Bills, 189, *192; *Smith v. Sheldon*, 35 Mich. 42; s. c., 24 Am. Rep. 529; *Collott v. Haigh*, 3 Camp. 281; 2 Am. Lead. Cas. 257; *Weimar v. Shelton*, 7 Mo. 237. The relation of the parties is not extinguished by fixing the liability of the indorser by presentment, demand of payment, non-payment and notice to indorser; nor is it altered by judgment against the maker. 2 Daniel Negot. Instr., § 1395; *Rice v. Morton*, 19 Mo. 263; *Hubbell v. Carpenter*, 5 Barb. 520; s. c., 1 Seld. 171; *Lafarge v. Herter*, 5 Seld. 245; *Chester v. Bank*, 16 N. Y. 336; *Smith v. Rice*, 27 Mo. 506; *Bank v. Hatch*, 6 Pet. 250; *Brown v. Riggins*, 3 Ga. 405; *Craig v. Cox*, 2 Bibb (Ky.) 309; *Sailly v. Elmore*, 2 Paige 497; *Bank v. Bartlett*, 13 Vt. 315. When a creditor has in possession money or property of the principal debtor, which he may rightfully retain and appropriate to the satisfaction of his debt without violating any duty or subjecting himself to any action, and instead of retaining it suffers it to

pass into the hands of the principal, the surety is thereby, to that extent, discharged. Therefore, the release of the property of the judgment debtor, sufficient to pay and satisfy the judgment, released and discharged the surety from further liability upon the note upon which judgment was obtained. *Perrine v. Ins. Co.*, 22 Ala. 575; *Springer v. Toothaker*, 43 Me. 381; *Cummings v. Little*, 45 Me. 183; *Baker v. Briggs*, 8 Pick. 122; *Payne v. Bank*, 14 Miss. (S. & M.) 24; *N. H. Savings B'k v. Colcord*, 15 N. H. 119; *Comm. v. Miller*, 8 Serg. & R. 452; *Neff's Appeal*, 9 Watts & S. 36; *Smith v. McLeod*, 3 Ired. Eq. 390; *Nelson v. Williams*, 2 Dev. & B. Eq. 118; *Griswold v. Jackson*, 2 Edw. Ch. 461; *Cullum v. Emanuel*, 1 Ala. 23; *Bank v. Thompson*, 3 Grant Cas. 114; *Everly v. Rice*, 20 Pa. St. 297; *Richards v. Comm.*, 40 Pa. St. 146; *Hurd v. Spencer*, 40 Vt. 581; *Comm. v. Hass*, 16 S. & R. 252; *Farmers' Bank v. Reynolds*, 13 Ohio 84; *Mayhew v. Boyd*, 5 Md. 102; *Ferguson v. Turner*, 7 Mo. 497; *Sneed v. White*, 3 J. J. Marsh. 525; *Mayhew v. Crickett*, 2 Swans. 193; *Winston v. Yeargin*, 50 Ala. 340; *Woodward v. Walton*, 7 Heisk. 50; *Clopton v. Spratt*, 52 Miss. 251; *Case v. Hawkins*, 53 Miss. 702; 5 Rob. Prac., (new Ed.) 766; 1 Parsons N. & B. 242; Byles on Bills, (*241,) 386; *Williams v. Price*, 1 Sim. & St. 581; *Ex parte Mure*, 2 Cox 63; *King v. Baldwin*, 2 John. Ch. 554; *Humphrey v. Hitt*, 6 Gratt. 509; *Hays v. Ward*, 4 John. Ch. 123; *Slevin v. Morrow*, 4 Ind. 425; *Smith v. Day*, 23 Vt. 656; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237; Byles, Sharswood's Ed. (*246, 247,) 392; 2 Am. Lead. Cas. 348; *Hubbell v. Carpenter*, 5 Barb. 520; 2 Daniel Negot. Instr., § 1311; *Storms v. Thorn*, 3 Barb. 314; *Lafarge v. Herter*, 11 Barb. 159; *Moss v. Pettin-gill*, 3 Minn. 217; *State B'k v. Edwards*, 20 Ala. 512; *Sher-raden v. Parker*, 24 Iowa 28; *Ashby v. Smith*, 9 Leigh 164; *Haven v. Foley*, 18 Mo. 136; s. c., 19 Mo. 632; *Fischer v. Meyer*, 24 Mo. 90; *Martin v. Taylor*, 8 Bush 384; *Bank v. Matson*, 24 Mo. 333; s. c., 26 Mo. 243; *McLemore v. Powell*, 12 Wheat. 556; *Wood v. Bank*, 9 Cow. 194; *Bank v. Han-rick*, 2 Story 416; *Newcomb v. Raynor*, 21 Wend. 108; Byles

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on Bills, (11 Ed.) 247 n. 1 (193); Story on Notes, (5 Ed.) § 413; *Woodman v. Eastman*, 10 N. H. 359; *Couch v. Waring*, 9 Conn. 261; *Okie v. Spencer*, 2 Whart. 253; *Hawkins v. Thompson*, 2 McLean 111; *Schroeppel v. Shaw*, 3 Comst. 452; *Ward v. Nass*, 7 Leigh 135.

Charles A. Davis and *A. R. Taylor* for respondent.

Nothing but payment will discharge the indorser after his liability has been fixed by demand, notice and protest. 2 Parsons Bills and Notes, 243, 244; *Bank v. Myers*, 1 Bailey 412; Baylie on Sureties and Guar., 472, 473. The indorser cannot compel the holder to resort to securities before enforcing the liability of the indorsement. *First Nat. Bank v. Wood*, 71 N. Y. 405; s. c., 27 Am. Rep. 66. If he wants the securities realized upon, he ought to pay the note as he has agreed; and then take the securities. *Beebe v. Bank*, 7 W. & S. 375. The indorser is as to the holder of a negotiable bill, the principal debtor. *In re Babcock*, 3 Story 393. Indorser not discharged by release of attachment levies. *Bank v. Dixon*, 4 Vt. 587. Nor by any indulgence to maker. *Clark v. Barrett*, 19 Mo. 39. Indorser is not a surety within the meaning of statute concerning sureties. *Clark v. Barrett*, *supra*. The statute (R. S., 666,) empowers a creditor to discharge one or more of joint or several debtors, without affecting his right against the remainder. Now, as defendant was one of several debtors to plaintiff, by the plain language of the statute plaintiff could absolutely discharge Ringrose J. Watson from all liability to him on the note, and not affect his right against defendant. So that it is perfectly clear that the plaintiff could do anything less than discharge Ringrose J. without affecting plaintiff's right against defendant. The greater comprehends the less; so that, if instead of simply withdrawing a levy on Ringrose J.'s property, he had given him a full release and discharge from all liability on the note to him,

he could have done so without in the slightest impairing his right against defendant.

NORTON, J.—This is an action instituted in the circuit court of the city of St. Louis, by plaintiff, as indorsee, against defendant, as indorser of a negotiable promissory note for \$3,000.

The defendant in his answer substantially alleged that he indorsed the note in question on the day of the date, for the accommodation of R. J. Watson, the maker, who discounted the same in the St. Louis National Bank and received the proceeds; that the bank, as holder, took all necessary steps to charge defendant, as indorser, and sued defendant and the maker upon the note; that the action was dismissed as to defendant and judgment obtained against the maker; that on this judgment execution was issued; that defendant thereupon informed the bank that he was merely an accommodation indorser upon the note, that the maker had property subject to execution, and requested the bank to levy upon the property of the maker and thus satisfy the judgment; the bank accordingly caused a levy to be made upon a tract of land in St. Louis county, belonging to R. J. Watson and worth \$5,000; also, upon some cord-wood belonging to R. J. Watson, worth \$2,000; also, upon some shares of stock belonging to the same defendant, worth \$2,000. The answer further says, that before the maturity of the note the plaintiff in this action, Priest, who is a brother-in-law of R. J. Watson, well knowing that defendant John A. Watson was a mere accommodation indorser on the note in question, for the accommodation of R. J. Watson, who is a brother of defendant, together with R. J. Watson, conceived the fraudulent design of imposing upon defendant the payment of the note; that R. J. Watson, though solvent, was somewhat embarrassed in his affairs, and to relieve him, Priest, on the 15th of February, 1876, purchased the judgment from the bank, paying the full amount and costs, and tak-

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ing an assignment to him, Priest ; that afterward, without the knowledge of this defendant, Priest directed the sheriff to release the levies upon the personalty above mentioned, which had been advertised for sale, and also to indefinitely extend the time of sale of real estate levied upon as aforesaid, and said property was in consequence discharged and released from levy of the execution, and no sale was had ; that afterward, on the 18th of December, 1876, Priest placed on record a deed duly executed and acknowledged by R. J. Watson and wife, whereby for the consideration, real or pretended, of \$5,000, they purported to convey the real estate above mentioned to Priest ; that this deed was dated and acknowledged the 20th day of November, 1875 ; but was not delivered until the day it was recorded, or, if delivered before, was made in fraud of the creditors of R. J. Watson and of defendant, as his surety, and was without consideration, and contrived to defraud defendant ; that R. J. Watson, since the date of these transactions, is a bankrupt ; and defendant claims that by reason of these matters the note is paid so far as defendant is concerned, and he prays that he be dismissed with costs, and that plaintiff be forever enjoined from instituting suit against him on this note.

Plaintiff demurred to this answer on the grounds that the facts constitute no defense, and that several defenses are improperly joined. The demurrer was sustained, and defendant refusing to plead further, judgment was rendered against him, from which he appealed to the St. Louis court of appeals, where the judgment was affirmed, from which he has appealed to this court.

The question presented by the above record is whether or not the holder of a negotiable note, after the liability of an accommodation indorser has become fixed, by notice of demand and protest, who obtains judgment against the maker of the note, and levies an execution issuing thereon, on sufficient personal property of the maker to pay the debt, and voluntarily releases the same to the maker, thereby

discharges the indorser. That such action on the part of the holder or indorsee releases such indorser, is clear, we think, if the rulings of this court heretofore made in the following cases are to be adhered to, and we can see no reason for departing from them, sustained as they are both upon principle and authority.

In the case of *Weimar v. Shelton*, 7 Mo. 237, it was held that an accommodation indorser is to be regarded in the light of a security, and as such is entitled to avail himself of any defense which would have availed the maker. In the case of *Ferguson v. Turner*, 7 Mo. 497, which was a suit against Turner, the indorser of a negotiable note, it was held that while mere negligence on the part of the payee in not suing or in giving time to the principal debtor will not discharge a surety, yet if the payee has a specific lien on the property of the debtor sufficient to satisfy the debt, and voluntarily surrenders the lien or loses it by his own neglect, the security will be discharged. In the case of *Smith v. Rice*, 27 Mo. 505, which was a suit against Rice as indorser, it was held that "the doctrine may be considered as settled in this State—where law and equity are administered in the same forum and in the same suit—that a judgment does not extinguish the relation of principal and surety; (*Morton v. Rice*, 19 Mo. 263;) and the same causes that discharge a surety will discharge an indorser, (*Bank of U. S. v. Hatch*, 6 Pet. 250)." No citation of authorities is needed to establish the proposition that a surety is entitled to any specific security for the payment of the debt which the principal debtor may have given the creditor, or which by operation of law the creditor may have acquired, and if the creditor releases or destroys voluntarily such security, that the surety is discharged to the extent that such specific security would have gone to pay the debt.

The facts set up in defendant's answer bring the case within the operation of the above principle, for they show that the creditor had seized and appropriated, by the levy

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of an execution, which issued on a judgment obtained against the principal, upon sufficient personal property to pay the debt, and that this property was voluntarily released to the debtor by the creditor without the assent of the indorser. If then the indorser in this case, notwithstanding the fact that the debt had been put into a judgment against the maker, was entitled in law to be discharged for the same causes that would discharge a surety, (and this was so held in the case of *Smith v. Rice, supra*,) it necessarily follows that the answer set up a complete defense to plaintiff's cause of action, and that the court committed error in sustaining the demurrer to it.

We have been cited by respondent's counsel, among others, to the following cases as sustaining the action of the trial court, viz: *Clark v. Barrett*, 19 Mo. 39; *Page v. Snow*, 18 Mo. 126, and *Miller v. Mellier*, 59 Mo. 388. In the first of the above cited cases it was simply held that "the act concerning securities," which required a creditor to commence suit within a given time after notice in writing was given him by a security requesting him to sue, did not apply to an indorser of a negotiable note. The case in 59 Mo. only holds that, after the liability of an indorser is fixed by demand and notice, the failure of the holder to proceed against the maker does not discharge the indorser. In the case of *Page v. Snow, supra*, where the maker and all the indorsers, except the first, were sued by the holder, a demurrer was interposed to the petition on the ground that all the indorsers should have been joined in the suit, and also on the ground that it should have been alleged in the petition that the note had not been paid by the indorser who had not been joined in the suit. In the disposition of this demurrer it was simply held that the holder of a negotiable note might sue all or any of the parties to it, and that it was sufficient to allege that the note had not been paid by defendants. The principle involved in the above cases has no application to the case at bar. Defendant in his answer does not seek to be relieved on the ground that

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the holder remained passive and did not act in pursuing the maker by suit, but on the ground that he did act, but acted wrongfully and to his prejudice by releasing property of the maker which he lawfully held in his grasp and which was sufficient to pay the debt. Judgment reversed and cause remanded, in which all concur.

THE STATE V. BROWN, *Appellant*.

1. **Practice: PRESUMPTIONS.** In the absence of evidence to the contrary, it is always presumed that the proceedings of a court of general jurisdiction have been taken in conformity to law. Hence, where the record in a criminal case showed that the jury were permitted to separate pending the trial, but did not show affirmatively that this was without the defendant's consent; *Held*, that there was no ground for reversing the judgment.
2. **Larceny.** Stealing from a dwelling house is grand larceny, regardless of the value of the property stolen. See *State v. Butterfield*, ante, p. 297.
3. **Practice: PRESUMPTIONS.** When the evidence is not preserved in the bill of exceptions, this court will assume that it warranted the instructions given by the court and the verdict found by the jury.
4. **Larceny: RECENT POSSESSION OF THE PROPERTY.** Where a prisoner indicted for larceny, upon the trial offered no evidence of good character; *Held*, that an instruction which told the jury to convict unless his recent possession of the stolen property was explained by the evidence, was correct. HOUGH and HENRY, JJ., dissent.

Appeal from Jasper Circuit Court.—HON. M. G. MCGREGOR,
Judge.

AFFIRMED.

This was an indictment for stealing from the dwelling house of one Cather property alleged to be of the value of \$15. The second instruction given on the part of the State was to the effect that if the jury believed that defendant took, stole and carried away of the property men-

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tioned in the indictment of any value whatever, in the dwelling of said Cather, and belonging to said Cather, they should find the defendant guilty of grand larceny. The fourth was as follows: If the jury believe from the evidence that soon after the commission of the offense charged in the indictment any portion of the property taken at the time of the commission of the offense was found in the possession of defendant, such possession is presumptive evidence of defendant's guilt, and if such possession of such stolen property is not satisfactorily explained by defendant, it will be conclusive evidence of his guilt; and the jury are further instructed that it devolves on the defendant to explain such possession.

A. L. Thomas for appellant.

D. H. McIntyre, Attorney General, for the State.

I.

SHERWOOD, C. J.—We will not reverse the judgment because the record does not show that defendant consented to the separation of the jury. It is true that section 1909 of the General Statutes, provides that the court, "with the consent of the prosecuting attorney and the defendant

* * * may permit the jury to separate, *
* except in capital cases." But that statute nowhere provides that the record shall recite the fact of consent given. In the absence then, of any objection appearing to the separation of the jury, the presumption will be that the necessary consent was given. Such presumptions always attend the acts and doings of courts of general jurisdiction. Since, then, the record is silent on the point, we will presume that the consent of the defendant was duly asked and obtained.

II.

There was no error in giving the second instruction

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asked on behalf of the State, if there was evidence offered to support the allegation of the indictment that the property was stolen from a dwelling house; for in such cases, the larceny is grand, regardless of the value of the property, and is punishable by imprisonment in the penitentiary not exceeding seven years. R. S. 1879, § 1309; *State v. Ramelsburg*, 30 Mo. 26.

As the evidence has not been preserved in the bill of exceptions, we shall assume that the court would not have given an instruction relating to larceny from a dwelling house, nor the jury have found defendant guilty as charged, unless upon sufficient evidence.

III.

The fourth instruction, given at the instance of the State, in reference to the recent possession of stolen property being presumptive evidence of the possessor's guilt, unless explained, etc., has always been the law of this State. *State v. Kelly*, 73 Mo. 608, and cases cited. No evidence having been preserved, and nothing to show that good character was established, the instruction was, doubtless, broad enough. We shall assume that it was, and that it conformed to the evidence.

Finding no error in the record, we affirm the judgment. All concur, except HOUGH and HENRY, JJ., who dissent as to the third paragraph in reference to the recent possession of stolen property.

BOOGHER, *Appellant*, v. THE LIFE ASSOCIATION OF AMERICA.

Corporations: MALICIOUS PROSECUTION. A corporation is liable to an action for malicious prosecution instituted by its authority. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315, overruled.

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Appeal from St. Louis Court of Appeals.

REVERSED.

Marshall & Barclay for appellant, cited, in addition to the cases referred to by the court in the opinion, *Johnson v. Dispatch Co.*, 65 Mo. 539; *Barrett v. R. R. Co.*, 3 Allen 101; *R. R. Co. v. Broom*, 6 Exch. 314; *Maynard v. Ins. Co.*, 34 Cal. 48; *Higgins v. Turnpike Co.*, 46 N. Y. 23; *Moore v. Fitchburg*, 4 Gray 465; *Bank v. Rogers*, 125 Mass. 339; *R. R. Co. v. Trans. Co.*, 83 Pa. St. 160; *State Board v. R. R. Co.*, 47 Ind. 407; *Darst v. Gale*, 83 Ill. 136; *Cooley on Torts*, p. 119; *Whitney v. Wyman*, 101 U. S. 392; *Turner v. R. R. Co.*, 51 Mo. 501; *Perkins v. R. R. Co.*, 55 Mo. 201; *Thornton v. Bank*, 71 Mo. 221.

Chas. A. Davis and *A. R. Taylor* for respondent.

NORTON, J.—This is an action for malicious prosecution, the petition alleging that “at all the times hereinafter mentioned the defendant was and now is a corporation, organized, existing, etc., by virtue of the laws of Missouri,
 * * and as such, at all times mentioned herein,
 had power * * to sue and be sued, complain and defend, * * prosecute and plead in any court of law or equity * * ; that said corporation *
 * maliciously * * on the 3rd day of July, 1875, * * caused to be made and filed by its president, acting therein in the line and scope of his duty and authority as such president, a certain affidavit or information * * wherein the said defendant * * falsely and maliciously and without probable cause whatsoever, charged and caused plaintiff to be charged with the crime of criminal libel upon said corporation; * * that defendant * * appeared before said court * * by agents, officers and attorneys, alleging and repeating the said false and malicious charges * * ; that said malicious

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* * prosecution of plaintiff was instituted by defendant acting by and through its board of directors in legitimate exercise of its statutory power as such board, to prosecute * * such action as it might deem advisable * * ; and that defendant employed at an enormous fee and charge three several attorneys *

* to aid the regular attorneys of the corporation in the said prosecution of plaintiff, * * and certain detectives were * * paid by defendant to furnish * * evidence, etc., * * ; that afterward, defendant ratified, confirmed and made its own, the acts hereinbefore recited, by regularly allowing, auditing and paying, as such corporation, and in the legal and regular exercise of its corporate powers to transact such business, certain attorneys * * who had been specially hired to, and had prosecuted plaintiff, as hereinbefore set forth, divers large sums of money as fees for their professional services in said prosecution of plaintiff; * *

and * * by retaining said informant as its president up to the present time," etc. The usual allegations of malice, want of probable cause, arrest, discharge, final termination of proceedings in favor of the plaintiff, and of damage, general and special, appear. Defendant demurred to the petition, which being sustained, plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which judgment of affirmance he appeals to this court.

The sole question presented on the record is, whether or not a suit for malicious prosecution can be maintained against a private corporation. The learned judge who delivered the opinion of the court of appeals affirmed the judgment on the authority of the case of *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315. That case unquestionably authorized the conclusion announced in the opinion of the court of appeals. It is, however, insisted by counsel for plaintiff that the principle of that case is not in harmony with the rule of corporate liability as laid down by the

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courts of this country and England, and that it should, therefore, be reconsidered and overruled. An examination of the authorities has satisfied us that the point made by counsel is well taken.

Before proceeding to review the authorities bearing upon the question, it may be well to observe that it will be seen from the petition that the alleged malicious prosecution was instituted by defendant through its president for libel on the company itself; that the complaint was made by the president in compliance with and in obedience to an order and resolution of the board of directors; that the expenses of the prosecution were paid by the company, and that it fully ratified all that was done in the premises.

That a person guilty of libeling a private corporation may be called upon to answer for the wrong civilly and criminally, is sustained not only by authority, but by reason. *State v. Boogher*, 3 Mo. App. 442; 2 Bish. Crim. Law, § 934; Whart. Crim. Law, § 2540; 23 N. J. L. 407; 9 Minn. 133. It would seem on principle that a corporation should have the same right to protect itself against such a wrong as an individual. It is within the range of probability that the business and interests of a corporation might be as effectually destroyed by a libel upon it as by the destruction of all its property by the torch of an incendiary. To restrict the right of a corporation to redress for such wrongs and to protection against their commission simply to a civil action against the wrongdoers would certainly afford them neither protection from nor redress for such wrongs in all that class of cases where the party sued is insolvent, and, therefore, unable to respond by the payment of damages which might be recovered, and would virtually put corporations completely in the power of the libeller and incendiary.

Where, however, the officers of the corporation, as in the case before us, acting by its authority, institute a criminal proceeding for a libel upon it, it is subject to the same

liabilities and responsibilities, which would be incurred by an individual who might commence and carry on such a prosecution, and if instituted without probable cause and maliciously, it would subject itself to an action for malicious prosecution. This position is sustained by the following authorities: Mr. Cooley, in his work on Torts, pages 119 and 121, observes that "Corporations are responsible for the wrongs committed or authorized by them under substantially the same rules which govern the responsibility of natural persons. It was formerly supposed that those wrongs which involved the element of evil intent, such as batteries, libels and the like, could not be committed by corporations, inasmuch as the State in granting them rights for lawful purposes, had conferred no power to commit unlawful acts; and such torts committed by corporate agents, must consequently be *ultra vires* and the individual wrong of the agents themselves. But this idea no longer obtains. * * The same reason that sustains an action against a corporation for a libel would sustain one for malicious prosecution, and though there are cases which hold that no such action can be supported, the better doctrine we should say was that laid down by some other courts which have sustained such actions. A corporation may also be liable for false imprisonment under circumstances corresponding to those which would sustain an action for any other forcible wrong." The cases cited in support of the statement made in the text "that there are cases which hold that no such action can be maintained," are *Childs v. Bank of Mo.*, 17 Mo. 213, and *Ousley v. Montgomery R. R. Co.*, 37 Ala. 560. The broad doctrine announced in the case of *Childs v. Bank of Mo.*, has since been expressly disapproved in the case of *Gillett v. Mo. Valley R. R. Co.*, *supra*, and the case in 37 Ala. is in effect overruled by the case of *South and North Ala. R. R. Co. v. Chappell*, 61 Ala. 529.

The same doctrine is also announced in Green's Brice's *Ultra Vires*, page 356, note "A," and the case of *Gillett v.*

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Mo. Valley R. R. Co., is criticised as not being in line with the authorities. In 2 Waite's Actions and Defenses the principle is stated thus: "A corporation is liable to the same extent and under the same circumstances as a natural person for the commission of its wrongful acts, and for the acts and negligence of its agents while engaged as such; and it will be held to respond in a civil action at the suit of a party injured, for every grade and description of forcible, malicious and negligent tort it commits, however foreign to its nature or beyond its granted powers it may be." In the case of *National Bank v. Graham*, 100 U. S. 702, it was observed that "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel." It is also expressly held in the following cases that an action for malicious prosecution can be maintained against a corporation: *Copley v. Machine Co.*, 2 Woods 494; *Ricord v. Central Pacific R. R. Co.*, 15 Nev. 167; *Vance v. Erie R'y Co.*, 32 N. J. L. 334; *Williams v. Insurance Co.*, 57 Miss. 759; s. c., 34 Am. Rep. 494; *Walker v. R. R. Co.*, L. R., 5 C. P. 640; *Carter v. Howe Machine Co.*, 51 Md. 290; s. c., 34 Am. Rep. 311; *Fenton v. Machine Co.*, 9 Phila. 189. In the case last above cited the subject is exhaustively considered, and the language of Gibson, C. J., in the case of the *Cumberland Valley R. R. Co. v. Baab*, 9 Watts 458, is approvingly quoted, where it is said: "That a corporation, in all cases within the scope of its legitimate functions, may act as a natural person may act, and the rule of corporate responsibility has

kept even pace with the growth of their powers, and the enlargement of their spheres of action, not only in regard to the enforcement of contracts, but also in making them amenable to personal actions for their torts, and holding them to the same measure of responsibility in these respects to which natural persons are held. Had this not been so, their existence would have become an evil too intolerable to be borne." So in the case of *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 S. & R. 11, where it was argued that a corporation could not commit a tort, Mr. Binney observed: "If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not amenable for it. If the act be not within the scope of their legitimate powers, they had no right to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice." In the case in 9 Phila., *supra*, it was held that an action for malicious prosecution would lie against a corporation, and that to maintain such action it is not necessary to show an express authority from the corporation to its agents to institute the prosecution and carry it on, but that it is sufficient to show that the prosecution was commenced and carried on by agents of the corporation in its interest and for its benefit, and that they acted within the scope of the authority conferred upon them by the corporation.

In the case before us the petition alleges that the prosecution was instituted by the command of the corporation acting through its directors, that two attorneys in addition to the regular attorney of the company were employed and paid by the company to carry it on, and that all that was done in the premises was ratified and approved. We are, therefore, of the opinion that the demurrer to the petition

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was not well taken, and that the court erred in sustaining it. The case of *Gillett v. Missouri Valley R. R. Co.*, 55 Mo. 315, being in conflict with the overwhelming weight of authority, is hereby overruled. Judgment reversed and cause remanded, in which all concur.

GAMBLE V. GIBSON, *Appellant*.

Referee's Report. There is no evidence in the record showing that defendant rendered any service for which, under the report of the referee and the judgment of the court below, he has not received adequate and complete compensation. The report of the referee is supported by the evidence and should not be disturbed.*

Appeal from St. Louis Court of Appeals.

AFFIRMED

This was a suit brought by the heirs of Hamilton R. Gamble against Chas. Gibson to recover the balance of the proceeds of certain sales of real estate made by Gibson under a power of attorney from plaintiffs. The contest in the case related to a claim made by defendant for compensation for services in laying off and subdividing the property and selling portions of it, and in procuring the opening of a thoroughfare and the extension of a line of street cars from the city to the property, and in otherwise handling it in such a manner as greatly to enhance its value. The case was referred to a referee, who allowed defendant for his services \$3,313.80, instead of \$16,600 as claimed by defendant. Upon the incoming of the referee's report, judgment was rendered for plaintiff for the amount found to be in defendant's hands less the allowance made by the referee. From this judgment defendant appealed

*This syllabus is taken from 7 Mo. App. 574.

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to the St. Louis court of appeals, where the judgment was affirmed, and from this latter judgment defendant appealed to this court.

E. T. Farish for appellant.

Martin & Lackland for respondents.

HENRY, J.—All concurring, the judgment of the court of appeals is affirmed.

BRAY V. MARSHALL, *Appellant*.

1. **Attorney**: IRREGULARITY IN JUDICIAL PROCEEDINGS NOT COLLATERALLY QUESTIONABLE. The mere fact that the purchaser at an execution sale was the plaintiff's attorney affords no reason for allowing a person denying the validity of the sale, to take advantage collaterally of irregularities in the proceeding out of which the execution grew.
2. **Attachment**: ORDER OF PUBLICATION. Where the affidavit for attachment contains a statement of all the facts necessary to entitle the plaintiff to an order of publication, no further affidavit is required to authorize such order.
3. **Sheriff's Deed**. Failure of the sheriff to make return of a sale under execution, as required by law, does not affect the validity of his deed.
4. ———. A certificate of acknowledgment to a sheriff's deed; *Held*, sufficient.
5. **Estoppel**: PLEADING. Facts relied upon as an estoppel *in pais* must be specially pleaded; otherwise evidence of them cannot be received.
6. **Instruction**: RENTS AND PROFITS. An instruction in relation to the mode of estimating rents and profits; *Held*, not objectionable.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.

AFFIRMED.

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The certificate of acknowledgment to the sheriff's deed was as follows: I, B. Appleby, clerk of the circuit court in and for Dade county, do hereby certify that on the 2nd of November, 1866, Samuel E. Shaw, sheriff of Dade county, appeared in open court at the October term, 1866, and acknowledged the execution of the foregoing deed, which was duly entered of record in book 4, on page 221.

Witness, B. APPLEBY, Clerk, Etc.

The instruction complained of, directed that "In estimating the value of the rents and profits, the jury will find what number of acres were in cultivation for each year, and how much rents for each year per acre were worth, and the aggregate sums for the several years will be the measure of damages which the plaintiff is entitled to recover."

DeArmond & Thurman for appellant.

The certificate of acknowledgment is defective in not stating before whom the acknowledgment was made, nor that the person making it was personally known to the court to be the sheriff and person who executed the conveyance, nor that the sheriff personally appeared. The instruction in relation to estimating rents and profits trenched upon the right and duty of the jury to ascertain the damages from the evidence in their own way.

J. C. Cravens for respondent.

HOUGH, J.—This is an action of ejectment. The plaintiff recovered judgment in the court below, and the defendant has appealed.

The petition is in the ordinary form. The answer admits that the defendant is in possession, and denies the other allegations of the petition. Both parties claim title under one Michael Keeney. The plaintiff claims under a sheriff's deed to himself, dated October 30th, 1866, founded

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upon a proceeding by attachment against said Keeney. The defendant claims title under a deed to himself and one Hardin, executed by said Keeney on the 14th day of September, 1867, and a subsequent conveyance from said Hardin to himself. Both Hardin and the defendant had actual notice of the sheriff's deed to plaintiff when they purchased from Keeney.

Several irregularities appear in the record of the proceedings by attachment, but none which render the judgment void, and none which present questions of sufficient gravity to merit any extended discussion. Indeed from the statement of counsel they seem to be referred to chiefly because the attorney who conducted the proceeding by attachment, was the purchaser at the execution sale. But that circumstance is of no consequence in the present proceeding. Nor would it be otherwise if the plaintiff in the attachment suit had himself become the purchaser. *Holland v. Adair*, 55 Mo. 40.

Counsel for the defendant err in their statement that the order of publication was made without any affidavit authorizing it. The affidavit filed for the purpose of obtaining the writ of attachment itself contained a statement of all the facts necessary to entitle the plaintiff to an order of publication. It is only where the affidavit for the attachment is based upon grounds other than those which will entitle the plaintiff to an order of publication, that an additional affidavit, setting forth grounds for an order of publication, becomes essential under the 23rd section of the attachment act. R. S. 1855.

Nor could the failure of the sheriff to make return of the sale affect the validity of his deed, or the title of the plaintiff thereunder.

The certificate of the acknowledgment by the sheriff, though not as full as it might have been, implies all that

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4. — the law requires and is in substantial compliance therewith, and we, therefore, hold that the sheriff's deed, read in evidence, conferred upon the plaintiff a good title.

No error was committed by the court in refusing to consider the facts offered by the defendant for the purpose of establishing an estoppel *in pais*. No such defense was pleaded, and even if the testimony offered were sufficient for that purpose, which we do not decide, it was properly excluded from the consideration of the court and jury.

5. ESTOPPEL: pleading.

We perceive no error in the instruction of the court in regard to the mode of estimating the rents and profits.

6. INSTRUCTION: rents and profits. The judgment of the circuit court will be affirmed. All concur, except SHERWOOD, C. J., who, having been of counsel, did not sit.

THE STATE V. PACQUETT, *Appellant*.

Murder. Instructions are erroneous, which authorize the jury to convict of murder in the first degree without requiring them to find both malice and deliberation; and the error is not cured by the giving of an instruction which correctly defines the offense.

Error to New Madrid Circuit Court.

REVERSED.

H. F. & C. P. Hawkins for plaintiff in error.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—The defendant was indicted at the March term, 1880, of the New Madrid county circuit court, for murder in the first degree for killing one James Barnes on

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the 4th of January, 1880. He was put upon his trial at November term, 1881, of said court, and convicted of the offense charged, and prosecutes to this court a writ of error, assigning among other errors the action of the court in giving improper instructions.

In the first instruction given for the State, the jury were told that if they believed the defendant willfully, deliberately and premeditatedly killed the deceased, they would find him guilty of murder in the first degree. The vice of this instruction is, that it wholly ignores the question of malice which is a necessary element in the crime of murder in the first degree, and authorized the jury to find defendant guilty of that crime, without finding that the killing was with malice aforethought.

In another instruction given for defendant the jury were told that if defendant willfully, premeditatedly and designedly, and of his malice aforethought, killed deceased, they would convict him of murder in the first degree. The vice of this instruction is, that it wholly ignores deliberation as an element of the crime, and authorized a conviction of defendant for a crime without finding one of the elements essentially necessary to constitute the crime.

The error committed in giving these instructions was not cured by another instruction which the court gave of its own motion, and which properly submitted to the jury all the elements constituting the crime of murder in the first degree. In the case of the *State v. Hill*, 69 Mo. 451, it was held that in a case for murder in the first degree, "it is a fatal error to give an instruction which ignores the element of deliberation, notwithstanding another instruction is given correctly defining the crime." For the errors above pointed out, under the authority of the following cases the judgment must be reversed: *State v. Simms*, 68 Mo. 305; *State v. Dearing*, 65 Mo. 532; *State v. Mitchell*, 64 Mo. 192; *Jones v. Talbot*, 4 Mo. 279; *Hickman v. Griffin*, 6 Mo. 37.

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As the cause will be remanded it may be well to observe that the instruction given by the court, as asked by the State, on the question of insanity, laid down the rule correctly as repeatedly adjudged by this court, and that on a retrial of the cause the instruction given by the court of its own motion upon that subject, should not be given.

Judgment reversed and cause remanded, in which all concur.

COLEMAN *et al.*, Appellants, v. ALLEN.

1. **Pre-emption of Public Lands:** ASSIGNMENT OF THE RIGHT. A. settled upon land, but was refused permission to enter the same. His right of entry being judicially determined in his favor after his death, his heirs consummated the pre-emption right, entered the land, and a patent was issued to them in 1866, whereupon they conveyed to B.; but they had previously, in 1862, conveyed to C. *Held*, that the conveyance executed prior to the entry and patent was valid as against that made subsequent thereto.
2. ———: ———. A pre-emption claim on lands not declared public, although contingent, is a fixed fact, awaiting such action of the government as will ripen the conditional into a positive right; and the pre-emptor, though he acquires no right against the government, is protected from intrusion by others, and his interest in the land is assignable.
3. ———: ———. The act of Congress of September 4th, 1841, (U. S. Stat., 456, § 12,) which declares all assignments of the rights thereby secured null and void, does not refer to the possession or the right of possession, to the title or to the land itself, but simply to the right to be preferred over all others as a purchaser from the government at an established price, and the limitation upon alienation in that act has no application to the rights secured to the heirs of a deceased settler under the act of March 3rd, 1843.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

*These syllabi are taken from 5 Mo. App. 127.

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Britton A. Hill and T. J. Delaney for appellants.

S. T. Glover and E. B. Cowan for respondents.

SHERWOOD, C. J.—We have examined this cause, and upon such examination, concur in the reasoning of the court of appeals. 5 Mo. App. 127. We, therefore, affirm the judgment of that court, which was in affirmance of that of the circuit court. All concur.

BECKMANN V. MEYER, *Appellant*.

1. **Homestead.** A homestead right acquired by the head of a family is not lost by the death of his wife or the removal of his children, if he continues to reside on the place.
2. ———. A homestead may be sold and another acquired with the proceeds, and the premises sold pass to the vendee discharged of judgment debts of the vendor.
3. ———. The visible occupancy of the premises as the head of a family, under a recorded title, fixes the character of the property as a homestead.
4. ———: **ESTOPPEL: ATTORNMEN.** The fact that A., the vendee of homestead property which was afterward sold under execution against the vendor, recognized the validity of the latter sale so far as to attorn to the purchaser at the sheriff's sale, does not estop him from asserting his rights by a proceeding to set aside the sheriff's deed.
5. ———: **SHERIFF'S SALE: RELEASE OF INCUMBRANCE.** Where the creditors of a vendor who has conveyed his homestead extinguish an incumbrance thereon, and sell the property under execution against the vendor, the purchaser at the sheriff's sale cannot have the original incumbrance enforced against the property in an action brought to set aside the sheriff's deed. The release was executed without instigation from the debtor's vendee, and the purchaser at sheriff's sale cannot be relieved from the consequences of his erroneous impression that the homestead property conveyed was subject to the claims of the vendor's creditors.*

*These syllabi are taken from 7 Mo. App. 577.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

H. C. Lackland and Theodore Bruere for appellant.

Chas. Daudt for respondent.

HENRY, J.—The opinion of the court of appeals in this case satisfactorily disposes of the questions presented by the record herein, and its judgment is affirmed. All concur.

The opinion of the St. Louis court of appeals was delivered by LEWIS, P. J., as follows:

In 1860, the plaintiff's father, Henry Beckmann, Senior, purchased from one Werner a farm containing about thirty acres, and moved thereon with his family, adopting it as his home. He had a wife and an only son, the plaintiff herein, who attained his majority in 1867, and afterward married, but, except for a short time, continued to live with his father until after the sale of the farm under execution, as hereinafter stated. Mrs. Beckmann, the elder, died in 1870. On September 24th, 1872, a judgment was rendered in the circuit court in favor of Charles Teichmann & Co., and on March 5th, September 5th and September 8th, 1873, judgments were rendered in favor of other parties, all against Beckmann, Senior, and aggregating upwards of \$7,000. On March 8th, 1873, the farm was conveyed from the father to the son for the expressed consideration of \$1,800. On March 19th, 1874, the farm with other real estate, was sold by the sheriff under the judgment above mentioned, as the property of Beckmann, Senior, and was purchased by the defendant and others acting with him, who have since conveyed their interest to the defendant. This suit is for a cancellation of the sheriff's deed conveying the farm, on the ground that, as the

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homestead of the defendant in execution the property was exempt from levy and sale. The circuit court decreed for the plaintiff.

One defense was, that the deed from Beckmann, Senior, to Beckmann, Junior, was without consideration, and was fraudulent and void as against creditors. There was no testimony to sustain this charge. It was shown that the son had worked for his father, upon an understanding that he was to be paid \$20 per month, for about six years after he became of age; that he never received any money and that, upon a settlement, the amount of consideration for the deed was reached by a calculation of the amount remaining due for the work. It was also shown that the father had previously given to his son another farm and put him in possession thereof; that after its occupancy by the young man for about a year, no deed having been delivered, the father found an opportunity for a favorable sale of the land, and proposed to his son an exchange of the Werner farm for the other. This was agreed to, and Beckmann, Junior, moved with his family back to the place which was still occupied by Beckmann, Senior. Subsequently, the deed was executed and delivered, as before mentioned.

The question upon which the controversy chiefly turns is, whether any homestead right existed, that could be made available against the sheriff's sale. It is insisted that Beckmann, Senior, was neither a householder nor the head of a family when the Teichmann judgment was rendered. This and two other judgments, amounting in all to more than \$14,000, ante-dated the deed to Beckmann, Junior. But it cannot be disputed that the homestead right was complete at the time of Mrs. Beckmann's death, in 1870. This being true, it remained unimpaired after that event, unless destroyed by some act of abandonment or voluntary relinquishment. It seems to be settled, on general principles, that a homestead once acquired by the head of a family will not be defeated or lost by the death

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or absence of his wife and children, if he continue to occupy it. Any other construction would render a husband who has been deprived of his family by accident or disease, or by their desertion without any fault of his, liable to be instantly turned out of his homestead by his creditors. *Silloway v. Brown*, 12 Allen 30; *Taylor v. Boulware*, 17 Tex. 74; *Myers v. Ford*, 22 Wis. 139. It appears in this case, that the old man continued to live on the farm after the death of his wife; and even after his conveyance to Beckmann, Junior, the father and the son with his family occupied the same house, with no apparent change in their domestic arrangements. Provisions were furnished sometimes by the father and sometimes by the son, and no accounts were kept between them. The proceeds of crops were generally collected by the old man. The testimony generally tended to show that the value of the farm was about \$1,500; though at the sheriff's sale it was knocked off for \$2,700. The law, in securing a homestead against creditors, does not render its humane provision ineffectual, by prohibiting an alienation of the premises. The householder may sell his homestead, and with the proceeds acquire another. This would be impossible, if the alienation of the first would subject it to judgment debts of the vendor. A judgment creates no lien upon a homestead, and, therefore, none will follow it into the hands of the vendee. *Green v. Marks*, 25 Ill. 221; *Cole v. Green*, 21 Ill. 104; *Smith v. Allen*, 39 Miss. 469; *Smith v. Rumsey*, 33 Mich. 191; *Black v. Epperson*, 40 Tex. 162. By Wagner's Statute, 699, § 8, when a new homestead is acquired the former one loses its exemption from liability for debts, but this manifestly applies only to cases wherein the first is still retained as the property of the debtor. The concluding part of the section recognizes a power to sell one homestead and purchase another with the proceeds.

From all this it results that the Werner farm in the hands of the plaintiff was not liable to execution for the debts of his father, unless, as the defendant claims, the

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plaintiff is estopped, by events which occurred at the sheriff's sale from asserting such exemption. 'It should be a sufficient answer to all that is urged for the defense in this connection, that the plaintiff does not appear to have been a party to any transaction that could create an estoppel against him. He gave notice of his ownership in the land and protested against the sale. His deed had long been on record. There was testimony tending to show that, on the day of sale, the old man claimed a homestead right in a certain corner house in the city of St. Charles, and that appraisers were chosen, under the statute, who set it apart to him at a valuation of \$1,500. But no such proceedings could affect any right of the plaintiff's, already vested in him by the deed from his father. The defendant's claim that the plaintiff participated in the setting apart of the corner house as a homestead is not sustained by the testimony. But were it clear that he did so, this could have no possible influence to deprive him of a title duly established upon the county records, and distinctly asserted against the proposed sale of his property.

Much of the argument for defendant seems to assume that the selection of a homestead remained with the debtor at the time of the execution sale, notwithstanding his previous alienation of the actual homestead. This implies that either the alienation of the homestead property extinguishes the exemption as to that particular property, or else the right itself is merely inchoate and undefined, until perfected by the appraisal and setting apart, after the levy of execution. We have already shown the error in the first proposition. The second is alike inadmissible. In some of the states, the filing of a declaration or other authentic act is required of the property owner, in order to secure the homestead exemption in the first instance. In Missouri, however, the recording of the deed whereby the land is acquired, together with the visible occupancy and use of the premises as a home, by the householder or head of a family, are all that the law requires. The exemption

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then dates from the filing of the deed for record. Wag. Stat., 698, § 7. In this case, the deed from Werner to Beckmann, Senior, was filed for record on March 29th, 1864. His subsequent occupancy and use fixed the character of the property as a homestead. Such was it character up to the conveyance to plaintiff. After that conveyance, Beckmann, Senior, had no further control of the property for any purpose. Whatever privileges might arise, or be denied him, as to a homestead in other lands, the rights vested in his vendee were not subject to disturbance.

It seems that at the time of the sale, an opinion prevailed among the execution creditors that inasmuch as the debtor was a widower without dependent family when the judgments were rendered, he was entitled to no homestead exemption of any sort. Hence, the deed to the plaintiff, being of later date than some of the judgments, was considered, as to them, a nullity. Beckmann, Senior, had, however, previously notified the sheriff in writing of his demand that a homestead exemption be recognized in the Werner farm. This notice was disregarded.

After all the property had been sold, except the corner house above mentioned, there remained a balance necessary to satisfy the executions of \$104. It was finally agreed that, as an act of kindness to the aged debtor, the house, which was worth \$1,500, should be sold under the executions, and, the creditors refraining from bidding, the plaintiff should be permitted to buy the property in his father's interest, for the balance required to settle the executions. This was done. It was singularly urged, as a defense to this suit, that in that transaction the debtor's claim of homestead exemption, if any he had, was satisfied. The proposition is repeated in argument here. But by what sort of logic an actual sale under execution is found to be a practical enforcement of an exemption from sale, we are unable to discover. That the plaintiff's acquiescence in such an arrangement for his father's benefit,

and his actual purchase in pursuance thereof, could operate an estoppel affecting his title to the Werner farm, is too preposterous for discussion. The sympathizing humanity of the creditors found expression simply in a movement which secured to them all that remained unpaid on their several claims. Their generosity would not permit them to outbid the plaintiff, when that would render them liable to pay over the resulting surplus to the debtor.

After the sheriff's sale, when it was generally agreed among all concerned, including a number of lawyers present, that there was no legal foundation for a homestead claim, the plaintiff remained on the Werner farm and paid rent for one year to the defendant and others, who had purchased it. There was a disagreement about the terms for a second year, whereupon the plaintiff surrendered possession. These facts, it is urged for defendant, constitute a distinct ground of estoppel against the plaintiff. We do not discover in them the essential elements of an estoppel. No definition of that term implies that, when a man through ignorance or mistake of the law, has yielded a part of his rights to an unjust claimant, he is, therefore, bound to surrender the whole.

In March, 1872, Beckmann, Senior, executed a deed of trust, conveying the Werner farm and other lands, to secure the payment of a note to Theodore Bruere, for \$1,200. This incumbrance was ahead of all the judgments, and also of the conveyance to Beckmann, Junior. The defendant and the other judgment creditors made a joint purchase of this debt and security, and proclaimed to bidders at the sheriff's sale that any purchaser would take a title divested of the incumbrance, and that the trust deed would be released on the margin of the record immediately after the sale. This promise was duly fulfilled. The defendant now asks that, notwithstanding the release, the original incumbrance may be, in some shape, enforced in his favor against the plaintiff's title. The reasons suggested are, that Beckmann paid nothing on the trust debt,

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and defendant has paid through the sheriff's sale, full value for the farm. There is no equity in this demand. The release was promised as an inducement to purchasers, and doubtless had its intended effect in securing to the creditors an increased sum for the satisfaction of their claims. It was deliberately executed, under no mistake or misrepresentation as to any matter of fact. The plaintiff did nothing to instigate the act, and it would be highly inequitable to permit the defendant to recede from it after it has accomplished its original purpose, merely because he may have been guided in the matter by unsound legal advice.

THE STATE *ex rel.* HARRIS V. HERRMANN, *Appellant.*

Constitutional Law : SPECIAL LEGISLATION : CLASSIFICATION BY POPULATION—BY OTHER CHARACTERISTICS : JUDICIAL NOTICE. The Notaries Act of 1881 is, both by its title and its first section, limited in its application to "all cities having a population of 100,000 inhabitants or more." The 4th section provides that "the office of any notary public in such a city holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law, shall be abolished at the expiration of ten days after the taking effect of this act."

Held, 1st, that the court would take judicial notice that the city of St. Louis was the only city in the State having 100,000 inhabitants at the time of the passage of the act, or which, by the usual increase of population, could be expected to have that number by the time the act should take effect; 2nd, that the 4th section, being applicable only to notaries "in such city," was special legislation and, therefore, unconstitutional; 3rd, that it was also special because it applied only to a particular class of notaries, viz: those whose commissions bore date prior to the passage of the act and had not expired when the act took effect.

Appeal from St. Louis Court of Appeals.

REVERSED.

This was a proceeding by way of information in the nature of a *quo warranto*, filed by the State through the circuit attorney, at the March term, 1881, of the St. Louis court of appeals. The information charged that the defendant had usurped the office of notary public within and for the city of St. Louis, and prayed judgment of ouster. In his answer the defendant set up that on the 22nd day of August, 1878, being legally qualified, he was duly appointed and commissioned by the Governor of this State to said office for a term of four years from said date, which date had not yet expired. To this answer the relator demurred, on the ground that the same did not state facts sufficient to show a valid cause why the said defendant exercised said office of notary public, in view of the act of the general assembly of the State of Missouri, approved March 24th, 1881, entitled "An act to regulate the appointment of notaries public in all cities having a population of 100,000 inhabitants, or more, and to vacate the offices of all notaries," etc. The demurrer was sustained, and judgment of ouster rendered against the defendant, who thereupon appealed to this court. The case was argued by counsel in this court, and the judgment of the court of appeals was affirmed; but upon motion of the appellant the court ordered a re-argument upon the single point stated in the opinion.

Marshall & Barclay for appellant.

Law being made theoretically, "not for a day, but for all time," a statute applicable to cities of certain population is a general law when it establishes a rule for the prospective government or regulation of all such cities as may, in the course of time, reach the prescribed population;

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but where the statute obviously acts only on a present state of facts in "such cities" and cannot by possibility apply to other cities that may attain, in future, such population, it is local, special and void. *Comm. v. Patton*, 88 Pa. St. 260; *Scowden's Appeal*, (Pa. S. C. Dec., 1881,) 7 South. L. Rev. 921; *State ex rel. v. Hammer*, 42 N. J. L. 439; *Devine v. Cook*, 84 Ill. 590; *Earle v. Board*, 55 Cal. 489; *McGill v. State*, 34 Ohio St. 228; *Klokke v. Dodge*, 14 Chic. Leg. News 147; *McConihe v. State*, 17 Fla. 238; *State v. Mitchell*, 31 Ohio St. 592; *Robinson v. Perry*, 17 Kas. 248; *Pittsburgh Assessor's case*, 2 Cent. L. J. 306; *Fields v. Commissioners*, 36 Ohio St. 480. Again, the constitution of Missouri contemplates and permits a classification by population to meet an existing state of facts for certain purposes, namely, to provide for and regulate fees of local officers, and to incorporate cities and towns. Const. 1875, art. 9, §§ 12, 17. Upon the principle, *expressio unius est exclusio alterius*, this permission implies a prohibition for all other purposes. *Klokke v. Dodge*, *supra*; *Worcester Bank v. Cheney*, 94 Ill. 430; *City v. Laughlin*, 49 Mo. 559; *Maguire v. Bank*, 62 Mo. 346. A statute, such as this section 4, which selects particular individuals, (namely, notaries whose commissions are dated prior to a date named in the act,) from a general class, (namely, all notaries in said jurisdiction,) and subjects them to peculiar rules from which the others in the same class are exempt, is a special law and void. ✓ *Cooley Const. Lim.*, p. *391; *State v. Tolle*, 71 Mo. 645; *Ex parte Westerfield*, 55 Cal. 550; *Smythe v. Monticello*, 12 Chic. Leg. News 12; *State v. Riordan*, 24 Wis. 484. Furthermore, it selects one class of the old notaries and vacates their commissions, while it gives other old notaries their full term of office. That is, those appointed under the old law, between March 24th, 1881, and June 26th, 1881, the date when the new law took effect, may hold their offices unmolested; but those appointed prior to March 24th, 1881, under the same old law, must vacate their offices. It thus makes one rule for one officer and a

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different rule for another officer of the same general class, qualified under the same law. This is obviously special legislation, forbidden by the constitution. *Nevada v. Mining Co.*, 15 Nev. 234; *Ex parte Westerfield*, 55 Cal. 550; s. c., 36 Am. Rep. 47; *Montgomery v. Com.*, 91 Pa. St. 125.

C. P. Ellerbe for respondent.

The principle announced in *State v. Tolle*, 71 Mo. 650, viz., that "a statute which relates to persons or things, as a class, is a general law, while a statute which relates to particular persons or things of a class, is special, and that classification does not depend on numbers," is decisive of this case.

Section 4 operates on all subjects of a particular class, viz: on the offices of all notaries, in the cities included in the classification, whose commissions bear date prior to the passage of the act, and whose terms should not have expired at the time of its taking effect. The idea of the appellant seems to be that at the time when the statute should go into effect there would be but one city in the State large enough to embrace the subjects in the classification. But such idea is founded upon a repudiation of the doctrine of classification asserted by this court. This court will not, except upon the clearest grounds and in manifest cases, overturn legislation as unconstitutional. Every intendment is to be made in favor of the validity of an act, and no presumptions are to be indulged against its validity. Therefore, instead of presuming that, at the date at which the act in question would take effect, there would be no city in the State other than the city of St. Louis, within the terms of the classification, that is, no other city having 100,000 inhabitants, the presumption, if any, would be the reverse. *State v. Tolle*, 71 Mo. 650; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 Pa. St. 411. But the question does not come to this, for the classification of cities, by population, being general, and not special,

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as we have seen, and, therefore, valid, although there may be but one city in the class, (*Kilgore v. Magee, supra*,) it follows that all legislation touching the subjects of legislation within any class, though it contain but one city, is general legislation, not special, though applying to the like subject nowhere else.

Now, the subjects of legislation under the operation of section 4, are a certain class of offices, viz: Offices of all notaries of cities having 100,000 inhabitants, whose commissions ante-date the passage of the act, and whose terms of office did not expire until after the act went into operation. Here is a classification of the subjects of the act, and the act applies to those subjects all over the State alike, wherever they are to be found. The section is, therefore, general and not special. It comprehends the whole of a proper class.

The cities are classified under the act by population, the subjects for the operation of the act by the dates of commissions and the terms of office. The only question remaining is, whether the latter classification is by arbitrary terms or by terms related to the objects and purposes of the statute. If the former, that is, if the facts upon which the classification is made to depend are arbitrary and taken merely for the purpose of evading the inhibition of the constitution, and not essential to the objects of the law, then we concede the classification would be void—but the contrary if essential to the objects of the law. *Wheeler v. Philadelphia, supra*; *Kilgore v. Magee, supra*; *State v. Parsons*, 40 N. J. L. 1, 8; 42 N. J. L. 649; *McConihe v. State*, 17 Fla. 238.

The object of the act was, for purposes of public utility, to concentrate into the hands of a sufficiently small number of officers the notarial business of populous cities to make the business so far compensating as to secure for this service efficient, able and reliable officers, it being notorious that the compensation, before the act, arising out of the great division of the business because of the great

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numbers of notaries, was not sufficient to secure for that service such officers as the public interests demand. This was the mischief to be overcome by the law, and we think it cannot be disputed that the abolition and vacation of the offices then existing under commissions running until after the act went into effect, were directly related to the objects and purposes of the act, and were essential to those purposes and objects. Such being the case, the classification made by the 4th section, by the dates of commissions in reference to the date of the passage of the act, and the date of the expiration of the terms of office under such commissions, in relation to the time the act went into effect, was not arbitrary, and constituted a lawful classification, and hence the 4th section is not within the inhibitory clause of the constitution—is not a special or local law.

A. Hamilton also for respondent.

There are no words in this 4th section which limit the application of the law to one (or two) cities only, which now exist, and, therefore, preclude its application to any other city, now or hereafter, which may have that population. It is certainly true that the act can now, in fact, operate only on the city of St. Louis, and can never operate to abolish offices and commissions in any future city, and for the plain reason that there would be none to be abolished, the laws creating them having been repealed; that is, there would be no subjects or persons in existence falling within the scope of the act. But it by no means follows that the law would not be applicable to all subjects and persons within its provisions, if such subjects or persons existed. The act itself contains no terms of limitation on its applicability to all cities within the State which belong to the class designated. And the case simply is, that the section operates on such subjects as fall within the scope of its provisions, and does not operate on any

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other subjects; and this is equally true of nearly every statute in the State.

D. H. McIntyre, Attorney General, also for the respondent.

SHERWOOD, C. J.—This cause has been re-argued upon the single point of the constitutionality of the 4th section of the notary act. Sess. Acts 1881, p. 172. That act is as follows:

An act to regulate the appointment of notaries public in all cities having a population of 100,000 inhabitants or more, and to vacate the offices of all notaries public in office in such cities ten days after the taking effect of this act.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. The Governor shall appoint and commission, in all cities having a population of 100,000 inhabitants, or more, one notary public only to every 3,500 inhabitants in said cities: Providing, that notaries, when receiving their commissions as such, and before qualifying as such, pay into the treasury of the State, to the use of the common school fund, the sum of \$25 each.

Section 2. The notaries public so appointed and commissioned shall be men of good moral character, and shall possess all the qualifications and exercise all the duties heretofore provided by law for notaries public, and shall give bond in the sum of \$10,000; such bond to be given under the provisions of section 6463 of chapter 134 of the Revised Statutes of the State of Missouri.

Section 3. The last national census preceding each appointment shall be taken as a basis upon which to make said appointment of notaries public, and the Governor shall only appoint and commission persons as notaries public, when it shall appear to him that the number of notaries public, in all cities having a population of 100,000 inhab-

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itants, is less than the number authorized to be appointed by this act.

Section 4. All acts and parts of acts inconsistent with this act are hereby repealed, and the office of any notary public in *such city* holding a commission bearing *date prior* to the passage of this act, and whose *term of office* as such notary public has not expired *at the time this act becomes a law*, shall be abolished at the expiration of ten days after the taking effect of this act; and every person who shall act or assume to act as notary public after his office shall be thus vacated, or after his term shall have expired, or without legal authority to act as notary public, shall be guilty of a misdemeanor.

Approved March 24th, 1881.

If section 4 is to be regarded as a *special law*, then, of course, it falls within the prohibition of the constitution. If a *general law*, then our judgment affirming that of the St. Louis court of appeals must stand. The point thus presented for our consideration, the difference between a general and a special law, has been extensively discussed and frequently adjudicated in those states possessing constitutions substantially identical with our own. We will now advert to and quote from some of the leading decisions, and endeavor to deduce the principles which they announce.

In *State ex rel. v. Hammer*, 42 N. J. L. 435, a law was assailed on the ground of being a special law, and the supreme court, in discussing this point, say: "It does not profess to be such, for its title is, 'An act relating to the assessment and revision of taxes in cities in this state.' But this descriptive generality is immediately dwarfed and curtailed by the initial words of the body of the enactment, for it at once proceeds to declare 'that in any city of this state where a board of assessment and revision of taxes now exists, such board,' etc., the effect being to restrict the operation of the law to those certain localities that were possessed, *at the time of the passage of the enact-*

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ment, of the body of officers so designated. The evidence before us shows that there were only two localities so circumstanced, the one being the city of Elizabeth and the other the city of Newark. The result, therefore, is, that the act was intended to apply and that *it does and must ever* apply to these two cities alone, and that the legal effect of this law, as now constituted, is the same as though it had, in express terms, declared that it was not to be operative through the state at large, but in the cities of Elizabeth and Newark only. Can a law thus designed and framed stand the constitutional test?" And the law was held special and, therefore, void.

That case is not, as counsel assert, in "direct conflict" with that of *Van Riper v. Parsons*, 40 N. J. L. 1, for Beasley, C. J., delivered the opinion of the court in each instance, and in commenting on the case last cited, said: "But a single argument has been presented in its support, which is that this act is general in its terms and embraces all of a group of objects having characteristics sufficiently marked and distinguished to make them a class by themselves; and these qualities, it is contended, bring this case within the requirements of the constitution, as the same is expounded in the case of *Van Riper v. Parsons*, 11 Vroom 1. But I do not understand that the decision thus invoked will bear the construction thus put upon it. It does not undertake, as I understand it, to lay down any abstract rule on this subject, but the expressions quoted are employed in reference to the facts then under adjudication. Plainly a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such a law may be in contravention of this constitutional prohibition. Thus, a law enacting that in every city of the state in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such a law, for it would sufficiently

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designate a class of cities, and would embrace the whole of such class; and yet it does not seem to me that it could be sustained by the courts. If it could be so sanctioned then the constitutional restriction would be of no avail, as there are few objects that cannot be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class."

So, in Pennsylvania, Mr. Justice Paxson, who delivered the opinion of the court in *Wheeler v. Philadelphia*, 77 Pa. St. 338, also delivered the opinion of the court in *Commonwealth v. Patton*, 88 Pa. St. 258, and consequently must be presumed entirely familiar with any points of similarity or dissimilarity between the two cases. In the latter, the act of assembly of 18th of May, 1878, was brought under discussion. That act provided, among other things, "that in all counties of this commonwealth where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this act, with a population exceeding 8,000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road, it shall be the duty," etc., and the learned judge in discussing the act, said: "The vital and controlling point in the case is whether the said act is obnoxious to the constitution as being special legislation within the terms of the constitutional prohibition. It was contended for the relators that the case came within the ruling in *Wheeler v. The City*, 27 P. F. Smith 338, and that the act was general, inasmuch as it applies to certain counties in the state as a class. A comparison of the act in question with the act of 23rd May, 1874, under which the case of *Wheeler v. The City* arose, will show some marked features of dissimilarity. The act of 1874 provided for the classification of the cities of the commonwealth. For the exercise of certain corporate powers, and having respect to the number, charac-

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ter, power and duties of certain officers thereof, the cities then in existence or *thereafter to be created* in this commonwealth were divided into three classes. It is true that in that classification the city of Philadelphia was the only city of the first class. But as was said in *Wheeler v. The City*, legislation is not intended for the present merely; it provides for and anticipates the wants of the future. The act of 1874 classifies cities by their population. The act of April 18th, 1878, can hardly be said to be a classification of counties. It is true that it speaks of all counties of more than 60,000 inhabitants. But it goes on to say, 'and in which there shall be any city incorporated at the time of the passage of this act, with a population exceeding 8,000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usual public traveled road.' *This is classification run-mad*; why not say all counties named Crawford, with a population exceeding 60,000, that contain a city called Titusville, with a population of over 8,000, and situated twenty-seven miles from the county seat? Or, all counties with a population of over 60,000, watered by a certain river or bounded by a certain mountain? There can be no proper classification of cities or counties except by population. * *

The learned judge finds the fact that Crawford county is the only county in the state to which the act of April, 1878, can apply at the present time. Said act makes no provision for the future, in which respect it differs from the act of 1874, which in express terms provides for future cities and the expanding growth of those now in existence. *That is not classification which merely designates one county in the commonwealth and makes no provision by which any other county may, by reason of its increase of population in the future, come within the class.*" And the act of 1878 was held unconstitutional. In a more recent case in Pennsylvania the doctrine of *Patton's case* has been re-affirmed. *Scowden's Appeal*, 7 South. L. Rev. 921.

In Illinois an act of the legislature was "by its terms

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limited in its operation to counties containing over 100,000 inhabitants," and the supreme court of that state, in discussing that act, say: "Its very terms preclude it from having any application to any county except the county of Cook, for we take judicial notice that no other county in the state contains over 100,000 inhabitants, nor can it be expected by any ordinary influx or increase of population that any other county will have that population within the brief period fixed for the duration of this law, viz: within a period of six years from the time the act should take effect. No express words that could have been used by the general assembly could limit the application of this law to the county of Cook more absolutely and definitely than those employed." *Devine v. Cook*, 84 Ill. 590. And in a still later case the same doctrine has been re-asserted. *Klokke v. Dodge*, 14 Chic. Leg. News 147.

In Ohio also similar views are expressed. Thus in *State ex rel. v. Mitchell*, 31 Ohio St. 592, it is said: "It is true the act in question is in the form, in a sense, of a general law. But as was said in the case of the *State ex rel. v. The Judges*, 21 Ohio St. 11, the constitutionality of an act is to be determined by its operation, and not by the mere form it may be made to assume. The act is entitled, 'An act to provide for the improvement of streets and avenues in certain cities of the second class,' and by the first section it is made applicable to 'cities of the second class, having a population of over 31,000, at the last federal census.' Columbus is the only city in the state having the population named at the last federal census, and the act, therefore, applies alone to that city, and can never apply to any other. The effect of the act would have been precisely the same if the city had been designated by name instead of by the circumlocution employed." And the act was held obnoxious to constitutional objections. Counsel for Herrmann cite other authorities which fully support those already cited, and there seems to be an entire unanimity in the later authorities in holding that laws such

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as have been already quoted and discussed fall under the ban of constitutions similar to our own.

The question then is, does section 4 of the notary act, in the light of the authorities we have quoted, present objectionable features similar to those acts of other states heretofore noticed? We are all of the opinion that it does, and these are reasons therefor: The notary act, it will be observed, both by its title and its first section, applies only to "all cities having a population of 100,000 inhabitants or more;" and section 4 repeals all inconsistent acts and abolishes "the office of any notary public in *such city* holding a commission *bearing date prior to the passage of this act*, and whose term of office as such notary public has not expired at the time this act becomes a law." Now, "courts will take notice of whatever ought to be generally known within the limits of their jurisdiction," and public matters affecting the government of the country. 1 Greenleaf Ev., § 56, and cases cited. Among these matters are the official records of the census, as to localities within their jurisdiction; and will take judicial notice that but one city in the State contains more than a certain number of inhabitants. *Devine v. Cook, supra*. Taking judicial notice then, as we must, of the official records of the census, so far as relating to the State, we find that St. Louis was the only city in the State possessing 100,000 inhabitants *at the time of the passage of the act*, or which by the usual increase of population could be expected to have that number when the act took effect. This then being ascertained, the city of St. Louis, under the authority cited, is to be regarded as the city intended, and the only city intended, as much so as if *called by name*. But if St. Louis had been thus directly designated no one would have the temerity to contend that such a law could withstand the charge of being a special law.

But the section under discussion is to be regarded as a special law for the additional reason that it can by no sort of possibility apply, except as to an *existing state of facts*—

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except as to those notaries whose commissions *bear date* prior to the passage of this act. All that is necessary to do in order to ascertain what notaries in the city of St. Louis are ousted by the 4th section is to examine the *date of their commission*. If such a law is worthy of the title of a *general law*, then assuredly one would be equally deserving of such title, which should designate notaries by the distance which they reside from the court house, and their stature, or the color of their hair or other individual peculiarities. It is obvious beyond question that section 4 applies only to a certain city, to-wit: St. Louis, and only to a certain class therein, to-wit: those notaries commissioned prior to March 24th, 1881, and whose commissions do not expire before June 26th, 1881. Thus bringing that section within the definition and distinction given and made by Dwaris between *general* and *public* acts, and such as are *special* or *private*. "That public acts relate to the public at large, and private acts concern the particular interests or benefit of certain individuals, or of particular classes of men." Potter's Dwaris, 52. Judge Cooley says: "A statute would not be constitutional * * which should select particular individuals for a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same class or locality are exempt. * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government." Cooley Con. Lim., 391. Section 4 does just this prohibited thing. It selects particular individuals, *i. e.*, notaries whose commissions bear certain dates, from a general class, *i. e.* all notaries in said jurisdiction, and subjects them to peculiar rules, from which all others in the same class are ex-

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empt. Such a law cannot be otherwise than special, and can justly bear no other name or designation.

It is claimed by counsel for relator that *State v. Hammer, supra*, asserts a doctrine different from that approved by this court in *State v. Tolle*, 71 Mo. 645. There is no warrant for such assertion. We still adhere to the doctrine there approved, "that a statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class, is special." This definition is virtually the same as the one we have already announced, and shows very conspicuously that section 4 belongs to that category of statutes which we have just seen relates to "particular persons * * of a class." But the statute under discussion in *Tolle's case* differs very widely from the one we are discussing. The section passed upon in that case was section 320, Revised Statutes 1879, which made provision that "in all cities having a population of more than 100,000 inhabitants, a board consisting of the judges of the circuit court of such cities, or a majority of the same, shall on or before the 1st day of November, 1879, and every two years thereafter, cause to be published," etc. That section related to "persons or things as a class," and, therefore, filled the definition of a general law. It did not single out and relate to "particular persons or things of a class." And more than that it would only operate, and was only intended to operate *in the future*, and its general rule would operate as fast as cities having a population of 100,000 inhabitants should give occasion to apply the law. In the case at bar, on the contrary, it is simply impossible that section 4 should ever operate except upon an *existing state of facts*, except as to "particular persons of a class," and that class residents of a certain city, to-wit: St. Louis. Its operation is centered upon those persons, and ceases when they are ousted according to its terms.* The section in question may be a general law *in form*, but courts of justice cannot permit constitutional prohibitions to be evaded by dressing up

special laws in the garb and guise of *general statutes*. In discussing the section in question it has not been our purpose to say aught against the validity of other sections of the notary act. We may remark, however, that an act may be partly void and partly valid if the parts are severable.

For the reasons aforesaid, the judgment of ouster is reversed and the writ dismissed. All concur.

THE STATE V. MALLON, *Appellant*.

1. **Pleading, Criminal.** An indictment in two counts will be good if each count contains a criminal charge sufficiently alleged, though the counts be repugnant to each other.
2. ——— : **ELECTION.** The fact that the several counts of an indictment are repugnant to each other, is no ground for compelling the State to elect between them.
3. **Practice in Supreme Court: INSTRUCTIONS.** Where the evidence adduced upon the trial is not preserved in the bill of exceptions, this court will assume that it warranted the instructions given, if such evidence could legitimately have been given under the indictment.
4. **Criminal Law: BREAKING JAIL.** Evidence that one accused of a crime has broken or attempted to break jail, is admissible, as tending to prove guilt. On the other hand evidence on the part of the accused explanatory of such attempt and tending to show that it was not prompted by a consciousness of guilt but by other considerations consistent with innocence, is equally admissible.
5. **Practice.** Error committed in withdrawing evidence from the jury is not cured by giving an instruction which permits them, in making up their verdict, to consider the facts which the excluded evidence tended to prove.
6. ———. Remarks of the prosecuting attorney; *Held*, not to call for a reversal.

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Appeal from Knox Circuit Court.—HON. BENJ. E. TURNER,
Judge.

REVERSED.

O. D. Jones and S. B. Davis for appellant.

D. H. McIntyre, Attorney General, for the State.

HENRY, J.—The defendant was indicted for robbery in the first degree. The indictment contained two counts, one charging defendant with taking the property from the person of the prosecutor by putting him in fear, and the other, with taking it from his person by violence, etc. A motion to quash, on the ground that the counts were repugnant to each other, was overruled. The court did not err in overruling that motion. Each count contained a criminal charge sufficiently alleged, and the repugnance of the counts was no ground for quashing the indictment.

Nor did the court err in refusing to compel the State to elect upon which count she would proceed. It is usual 2. — : election. to frame several counts where only a single offense is intended to be charged, for the purpose of meeting the evidence as it may transpire at the trial; and in such cases the court will not compel the prosecutor to elect. *State v. Porter*, 26 Mo. 206; *State v. Pitts*, 58 Mo. 556.

The evidence is not preserved by the bill of exceptions, and we cannot say, therefore, whether it warranted the court in giving the instructions complained of or not. Evidence might legitimately have been introduced under either count of the indictment, which would have justified the court in giving the instructions, and as appellant has not preserved the evidence, we must assume that such evidence was adduced, especially as the bill of exceptions contains the following statement: "The trial was proceeded with, and the State

1. PLEADING, CRIMINAL.

3. PRACTICE IN SUPREME COURT: INSTRUCTIONS.

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offered evidence tending to prove the commission of the crime by the defendant, and sufficient to support a conviction as admitted by the attorneys for defendant, in this their bill of exceptions, and among other evidence proved that defendant had broken jail while confined on this charge and secretly left the State."

Defendant testified as a witness in his own behalf, and with respect to his having broken jail, as follows: "I did not break jail because I feared a trial and conviction on this charge; the reason was, I was mistreated." The answer was objected to by the State's attorney, and the objection was sustained by the court. In this, we think, the court erred. Evidence that one accused of a crime has broken or attempted to break jail, is admissible, as tending to prove guilt, and, therefore, any evidence on the part of the accused, explanatory of such attempt, and tending to show that it was not prompted by a consciousness of guilt, but by other considerations consistent with innocence, is admissible.

The error committed by the court was not cured by an instruction given at the instance of defendant: "That although the jury may believe from the evidence that the defendant did break jail while confined on this charge, yet if they did not believe that he did it from a motive to flee and avoid a trial on this charge, they should not consider it as an element in making up their verdict as to defendant's guilt or innocence." That would have been a proper instruction if defendant's testimony on that subject had been received, but having virtually withdrawn it from the jury, the defendant could have derived no benefit from the instruction.

We have noticed all the alleged errors except that in relation to alleged misconduct of the prosecuting attorney. The following statement in his address to the jury is complained of: "Their theory is that a soberer man than Mallon or Brown got the money, but you are not to guess at this matter. There is no evidence that the money was

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lost, or that any one got it but Mallon." This was but his opinion of what the evidence proved, and there was no impropriety in expressing that opinion, however erroneous it may have been. No verdict in a case contested before a jury could stand, if on such grounds, this court should hold that their verdict should be set aside. What the attorneys of the respective parties to a litigation labor to demonstrate to a jury, is that the evidence establishes the facts on which they respectively rely for a verdict. This is legitimate.

Nor was the other remark attributed to the prosecuting attorney so far out of the way of professional propriety, as to justify this court in interfering with the verdict. It was to the effect that there is no security for the lives or property of citizens if juries fail to do their duty, while crime is so greatly on the increase. There was nothing in that observation that could have prejudiced the defendant. It was but the declaration of a duty of juries, everywhere recognized, and the statement of the fact that crime was on the increase could certainly have been no inducement to the jury to convict the defendant, if the evidence did not warrant his conviction. For the error above indicated, the judgment is reversed and the cause remanded.

THE STATE *ex rel.* HARRIS V. LAUGHLIN.

1. **Mandamus to Inferior Courts: JURISDICTION.** Where an inferior court having determined that it had no jurisdiction and that another tribunal had exclusive jurisdiction, for that reason declined to proceed to a final disposition of a criminal case, and ordered it transferred to the other tribunal for that purpose; *Held*, that this court would, upon an application for a mandamus to compel the inferior court to proceed, inquire into the question of jurisdiction, and if it found the jurisdiction to exist would issue the writ.

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2. **Constitutional Law** : TITLE OF ACT : GAMBLING. An act was entitled "An act to amend section 1547 of article 8 of the Revised Statutes, relating to offenses against public morals and decency, or the public police, and miscellaneous offenses." Section 1547 made gambling a misdemeanor; while the new act made it a felony and changed the penalty accordingly. *Held*, that the subject of the new act was expressed in the title with sufficient clearness to answer the requirements of section 28, article 4 of the constitution.

Mandamus.

PEREMPTORY WRIT AWARDED.

Joseph R. Harris, relator, *pro se*.

Mandamus is the proper remedy. Tapping on Mand., *12; Moses on Mand., 19; *Rex v. Barker*, 3 Burr. 1267; *Rex v. Windham*, Cowp. 378; *People v. Superior Ct.*, 19 Wend. 68; High on Extr. Leg. Rem., § 156, note; *Judges v. People*, 18 Wend. 79; *Chase v. Blackstone C. Co.*, 10 Pick. 244; *Virginia v. Rives*, 100 U. S. 323; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Newman*, 14 Wall. 165, 168; *Ex parte Crane*, 5 Pet. 190; *Ex parte Bradstreet*, 7 Pet. 647; *People v. Judges*, 1 Cow. 576; *Sanders v. Nelson Cir. Ct.*, Hardin 17; *Stafford v. Bank*, 17 How. 278; *Beguhl v. Swan*, 39 Cal. 411; *Ex parte Lowe*, 20 Ala. 330; 4 Ala. 393, 569; 5 Ala. 130; 6 Ala. 172; 9 Ala. 627; 13 Ala. 314; 20 Ala. 331; 23 Ala. 518; 26 Ala. 50; 29 Ala. 71; *People v. Scates*, 4 Ill. 351; *Ex parte Milner*, 6 Eng. L. & Eq. 371; *State v. Judges*, 29 La. Ann. 785; *Ex parte Henderson*, 6 Fla. 279; *State v. Judge*, 2 Iowa 280; *People v. Ins. Co.*, 19 Mich. 392; *Lagrange v. State Treasurer*, 24 Mich. 468; *Field v. Judge*, 30 Mich. 10; *Tetherow v. Grundy Co. Ct.*, 9 Mo. 118; *Hall v. Audrain Co. Ct.*, 27 Mo. 329; *State v. Lewis*, 71 Mo. 170; *State v. Cape Girardeau Ct.*, 73 Mo. 560; *Castello v. St. Louis Cir. Ct.*, 28 Mo. 259; *Garrabrant v. McCloud*, 15 N. J. L. 462; *Ten Eyck v. Farlee*, 16 N. J. L. 269; Moses on Mand., 30; *Williams v. Judge*, 27 Mo. 225; *Blecker v. Law Commr.*, 30 Mo. 111; *State v. Engleman*, 45 Mo. 27; *Ex parte Morris*,

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11 Gratt. 292; *Wright v. Johnson*, 5 Ark. 687; *Life Ins. Co. v. Wilson*, 8 Pet. 302; 1 Chitty Prac., 797; *Rex v. Middlesex*, 4 B. & Ald. 298; *Rex v. Worcester*, 1 Chitty 649; *Queen v. The Justices*, 3 Ad. & E. (N. S.) 810; *Rex v. Wiltshire*, 10 East 404; *Queen v. The Justice*, 2 Q. B. D. 516; *Queen v. Adamson*, 1 Q. B. D. 201; *Rex v. Inhabitants*, 5 B. & Ad. 597; *Reg. v. Richards*, 3 Eng. L. & Eq. 410; *Queen v. Brown*, 7 Ell. & B. 757; *Rex v. Justices*, 5 B. & Ad. 672; *State v. Sutterfield*, 54 Mo. 395; *Miller v. Richardson*, 1 Mo. 310; *Sipp v. St. Louis Cir. Ct.*, 1 Mo. 356; *Anderson v. Brown*, 6 Fla. 299; *Purcell v. McKune*, 14 Cal. 230; *People v. Wayne Co. Ct.*, 1 Mich. 359; *Rhodes v. Craig*, 21 Cal. 419; *Re Turner*, 5 Ohio 542; *Floral Springs Co. v. Rives*, 14 Nev. 431; *Ex parte The State*, 51 Ala. 69; *Ex parte Loring*, 94 U. S. 418; *Ex parte Flippin*, 94 U. S. 348; *Gunn v. County of Pulaski*, 3 Ark. 427; *State v. Smith*, 19 Wis. 531; *Brem v. Arkansas Co. Ct.*, 9 Ark. 240; *People v. Wayne Cir. Judge*, 39 Mich. 115; *Miller v. Bay Cir. Judge*, 41 Mich. 326.

The title of the act is sufficient. *State v. Ranson*, 73 Mo. 88; *City v. Tiefel*, 42 Mo. 592; *Cooley Const. Lim.*, (4 Ed.) 176; *Ryerson v. Utley*, 16 Mich. 277; *Sun Mut. Ins. Co. v. The Mayor*, 8 N. Y. 253; *Morford v. Unger*, 8 Iowa 82; *Whiting v. Mount Pleasant*, 11 Iowa 482; *Indiana Central R. R. v. Potts*, 7 Ind. 681; *State v. Bowers*, 14 Ind. 195; *State v. County Judge*, 2 Iowa 280; *Brewster v. Syracuse*, 19 N. Y. 116; *Johnson v. Higgins*, 3 Met. (Ky.) 566.

Patrick & Frank and *F. D. Turner* for respondent.

The amendatory act contravenes section 28, article 4 of the constitution of 1875, and is void. The provision that "no bill shall contain more than one subject, which shall be clearly expressed in the title," is mandatory and equally obligatory upon the general assembly with any other provision in the constitution, and where a bill is adopted clearly and palpably in opposition to it, there is no alternative but to pronounce it invalid. *State v. Miller*,

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45 Mo. 498; *Weaver v. Lapsley*, 43 Ala. 227; *State v. Ah Sam*, 15 Nev. 30; s. c., 37 Am. Rep. 454; *Cannón v. Mathes*, 8 Heisk. 516; *Prothro v. Orr*, 12 Ga. 40; Cooley Const. Lim., (2 Ed.) § 150; *Indiana C. R. R. Co. v. Potts*, 7 Ind. 683; *State v. Lafayette Co. Ct.*, 41 Mo. 39; *People v. Mellen*, 32 Ill. 183. The general object of the bill is all that the constitution requires to be expressed in the title of the bill. The title need not index the contents of the bill, and all matters congruous to and in prosecution of its general object may be inserted and be contained in the body of the bill without being specially mentioned in its title. *Matter of Burris*, 66 Mo. 446; *People v. Hurlbut*, 24 Mich. 57; s. c., 9 Am. Rep. 103; *People v. Mahaney*, 13 Mich. 495; *White v. Lincoln*, 5 Neb. 505; *Ex parte Upshaw*, 45 Ala. 236; *Reed v. State*, 12 Ind. 642; 45 Mo. 498; *St. Louis v. Tiefel*, 45 Mo. 278; *State v. Mathews*, 44 Mo. 523; *State v. Bank*, 45 Mo. 528; *Walker v. State*, 49 Ala. 331; *People v. The Institution, etc.*, 71 Ill. 233; *Parkinson v. State*, 14 Md. 196; *State v. County Judge*, 2 Iowa 281.

The rule of the constitution of 1875, that the subject of a bill, with the exception of bills called appropriation bills and bills passed under the third subdivision of section 44 of article 4 of the constitution, shall be expressed in the title thereof, is open to an additional exception as to acts which are professedly amendatory of others, which exception owes its origin to a construction of the constitutional provision by the courts of this State and by the courts of other states having similar provisions in their constitutions. When the words of an act declare it to be an act to amend an act or a section of an act, the title of the amendatory act need not necessarily express the subject of the act or of the section of the act which it amends, or of the amendment proposed, by words of its own, but will so express it sufficiently if it declare the act to be "An act to amend," and recite in the title after so declaring the title of the original act which it amends. This is so because the subject of the amendatory act is required in

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all cases to be germane and congruous to the general object of the original act which it affects, and to recite the title of the original act in the title of the amendatory act is to express the subject of the amendment in the title of the amendatory act. *State v. Ranson*, 73 Mo. 88; *St. Louis v. Tiefel*, 42 Mo. 588; *State v. Bowers*, 14 Ind. 195; *People v. Willsea*, 60 N. Y. 508; *Yellow R. I. Co. v. Arnold*, 46 Wis. 221; *People v. Briggs*, 50 N. Y. 561. If the title of an amendatory act instead of reciting in it in full the title of the original act which it amends, states the subject of the act or of the section which it amends in its own words, or states that it is an act to amend section so and so of chapter so and so, or chapter so and so, and in its own words or in some of the words only of the title of the act which it amends, describes the subject of such section or such chapter, the constitutionality of the act turns entirely upon the question whether the language employed in the title of the amendatory act adequately expresses the subject of the act or of the section amended, or of the amendment in the amendatory act; and under such circumstances the title of the amendatory act can in nowise be aided or helped by the fact, if it be so, that the title of the original act would have embraced the amendatory provision had it been inserted in the original act. The fact that the title to an original act would have authorized the amendatory provision to be inserted in its body had it been done cannot be considered by the court where the title of the original act is not recited in the title of the amendatory act. *State v. Ranson*, *supra*; *People v. Molineux*, 53 Barb. 9; *State v. Mead*, 71 Mo. 266. An amendatory act, entitled "An act to amend section — of article — of the Revised Statutes," expresses no subject and only contains a reference where the subject might be found. A reference to the subject is not what the constitution requires. It must be expressed "in the title." *People v. Hills*, 35 N. Y. 449; *People v. Briggs*, 50 N. Y. 561; House Jour., 30th Gen. Ass. Mo. pp. 1654, 1655; *Leonard v. January*, 56 Cal. 3

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The provision in the constitution of 1865 had been, long prior to its adoption, a part of the organic law of many other states, and in many of them it had been held that "the legislature must determine for itself how broad and comprehensive shall be the subject of a statutory enactment under it, and how much particularity shall be employed in the title defining it." *Bibb Co. Loan Association v. Richards*, 21 Ga. 592; *Ex parte Pollard*, 40 Ala. 98; *Mut. Ins. Co. v. New York*, 4 Seld. 241; *Brewster v. Syracuse*, 19 N. Y. 117; *State v. Town of Union*, 33 N. J. L. 354; *People v. Banks*, 67 N. Y. 568; 42 Mo. 592; 14 Ind. 195; 7 Ind. 681.

This general interpretation of provisions similar to that in our constitution of 1865, had a tendency to uphold acts whose titles expressed their subjects in a doubtful and obscure manner, and to destroy the mandatory nature of the provision; and this was doubtless the cause which led the convention of 1875 to define in the constitution the degree of particularity which must be used in the title of a bill in expressing its subject, and to require its subject to be "clearly expressed." It is a settled rule of construction, that where a provision of the organic law antecedently to a revision of the constitution is settled either by clear expressions in the constitution, or adjudications on it, a change of phraseology, if it evidently purports an intention to work a change in the law, will be construed to do so, and that where the words of a statute differ from the words of a prior statute on the same subject, it is evidence they are to have a different and not the same construction. The change from the original requirement "shall be expressed," to the subsequent requirement, "shall be clearly expressed" in the title, should be given all the force the change imports. *Hyatt v. Allen*, 54 Cal. 355; *Sedgwick on Construction of Statutes*, 365; *Davis v. Davis*, 75 N. Y. 225; *Matter of Brown*, 21 Wend. 319; *Ennis v. Crump*, 6 Texas 35; *Miller v. The State*, 3 Ohio St. 475; *Rich v. Keyser*, 54 Pa. St. 89; *Lehman v. Robinson*, 59 Ala. 236. A bill is held, under provisions in constitutions similar to

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that in the constitution of Missouri of 1875, to be void if its subject is in the words employed in its title to express it, hidden in covert concealment or left to be groped for through doubts and difficulties; through obscurities and uncertainties, and with misgivings and perplexities. *Weaver v. Lapsley*, 43 Ala. 227; *Dorsey's Appeal*, 72 Pa. St. 192; *Union P. R. Company's Appeal*, *81 Pa. St. 93; *Comm. v. Dickinson*, 9 Phila. 562; *Kansas City v. Payne*, 71 Mo. 161; *Rader v. The Township*, 39 N. J. L. 512; *State v. Barrett*, Kansas S. C. 1882; *People v. Commissioners*, 53 Barb. 70; *People v. O'Brien*, 38 N. Y. 195; *Par. Bossier v. Steele*, 13 La. Ann. 434; *Matter of Lands in Flatbush*, 60 N. Y. 407; *State v. Silver*, 9 Nev. 231; *People v. McCann*, 3 Park. Crim. Rep. 299; *People v. Hills*, 35 N. Y. 449; *Durkee v. Janesville*, 26 Wis. 701; *Fishkill v. Plank Road Co.*, 22 Barb. 643; *Elevated R. R. Cases*, 3 Abb. N. C. 406.

Mandamus will not lie in this case. The matter decided by the St. Louis criminal court was within its jurisdiction to determine. The court having after due notice and full argument adjudged the law to be unconstitutional, no matter how erroneous its decision may be, it cannot be reviewed or reversed under the law by means of this writ. The writ does not lie to correct errors of inferior tribunals by annulling what they may have done erroneously, nor to guide their discretion. *Dunklin Co. v. District Co. Ct.*, 23 Mo. 454; *Fitch v. McDiarmid*, 26 Ark. 486; *Kentucky v. Denison*, 24 How. 66; *Williams v. The Judge*, 27 Mo. 225; *State v. McAuliffe*, 48 Mo. 112; *People v. Hatch*, 33 Ill. 140; *People v. Lieb*, 85 Ill. 484; *People v. Klokke*, 92 Ill. 134; *State v. Babcock*, 51 Vt. 570; *State v. Garesche*, 65 Mo. 480; *State v. Wilson*, 49 Mo. 148; *Milttenberger v. St. Louis*, 50 Mo. 173; *State v. Macon Co. Ct.*, 68 Mo. 48; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Newman*, 14 Wall. 165; *Ex parte Sawyer*, 21 Wall. 238; *Ex parte Hoyt*, 13 Pet. 290; *Ex parte Railway Co.*, 101 U. S. 720; *Ex parte Perry*, 102 U. S. 186; *Ex parte Flippin*, 94 U. S. 348; *Ex parte Loring*, 94 U. S. 418; *Ex parte Koon*,

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1 Denio 644; *People v. Weston*, 28 Cal. 639; *Ex parte Johnson*, 25 Ark. 614; *State v. R. R. Co.*, 15 Fla. 217; *State v. Judge*, 26 La. Ann. 116; *Fancisco v. Ins. Co.*, 36 Cal. 283; *Ex parte Shandries*, 11 Reporter 832; *Ex parte Graves*, 61 Ala. 385; *State v. Norton*, 20 Kas. 507; *People v. Dowling*, 55 Barb. 197; *Swan v. Gray*, 44 Miss. 393; *Little v. Morris*, 10 Texas 263; *Reg. v. The Justices*, 28 Eng. L. & Eq. 160; *Queen v. The Justices*, 14 Ad. & E. N. S. 396.

HOUGH, J.—At the March term, 1882, of the St. Louis criminal court, the grand jury returned an indictment against Robert C. Pate and others therein named, charging them with feloniously setting up and keeping a certain gambling device, adapted, devised, and designed for the purpose of playing a certain game of chance, commonly called keno, for money; and with feloniously inducing, enticing and permitting certain other persons by means of said gambling device to bet and play at said game of keno for money. The defendants in said indictment filed a plea to the jurisdiction of the criminal court, alleging that the act of March 9th, 1881, making gambling of certain kinds a felony, under and by virtue of which act the grand jury found and filed said indictment, was unconstitutional and void, because the title of said act does not meet the requirements of section 28, article 4, of the constitution, and for other reasons which it is unnecessary to notice; that the offense charged was, therefore, a misdemeanor only, and not a felony, and said court had no jurisdiction thereof. After hearing said plea, and on the 1st day of May, 1882, the criminal court made the following order: "This day the court sustains the plea and the amended plea to the jurisdiction in each and all of the above cases, and it appearing to the court that the offenses charged in said indictments are misdemeanors, and the St. Louis court of criminal correction having exclusive jurisdiction of such cases, it is ordered that each and all of said indictments be certified and transmitted to the said St. Louis court of criminal

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correction for trial." On the following day the circuit attorney for the city of St. Louis made application to the St. Louis criminal court to vacate and set aside the foregoing order and to proceed with the trial of said indictment, which said court refused to do, and he now makes application to this court for a writ of mandamus to compel the judge of said court to proceed with the trial of the indictments aforesaid.

The writ of mandamus is one mode of exercising the superintending control over inferior courts conferred upon
I. MANDAMUS TO:
 INFERIOR COURTS:
 jurisdiction. this court by the constitution. It is well settled, too, that this writ can be resorted to in criminal cases as well as civil. Bishop's *Crim. Proc.*, § 1402, and cases cited. In neither class of cases, however, can this writ be made to perform the functions of a writ of error or an appeal. When addressed to subordinate judicial tribunals, it simply requires them to proceed to exercise their judicial functions. *State ex rel. Adamson v. Lafayette Co. Ct.*, 41 Mo. 224; *State ex rel. Metcalf v. Garsche*, 65 Mo. 489; *State ex rel. Watkins v. Macon Co. Ct.*, 68 Mo. 48; Bishop's *Crim. Proc.*, § 1403, and cases cited. Of course this court would not compel an inferior court to proceed to try a case of which it had no jurisdiction, and where an inferior court refuses to proceed and finally dispose of a case on the ground of an alleged want of jurisdiction, on application made to this court to compel such inferior court to hear the same, it will be the duty of this court to determine whether such inferior court has jurisdiction of the cause, and such determination will be binding upon the inferior court. This is established by all the authorities.

The peculiar character of the order made by the criminal court in sustaining the plea to its jurisdiction relieves us of the necessity of examining and deciding many points which were presented in the oral argument, and are to be found in the briefs of counsel, based upon the supposition that the indictment pending in the criminal court had been

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finally disposed of. By reference to the order of the court, however, it will be observed that the indictment has not been quashed, nor adjudged defective or insufficient; neither has the prosecution been dismissed, nor have the defendants been discharged. The true and only legal construction which can be given to the order made by the criminal court, is, that the court has stricken the case from the docket and refuses to proceed with the trial, although the indictment is still pending in that court; for the order to transfer the indictments to the court of criminal correction is wholly without warrant of law and utterly void. The criminal court could not divest itself of jurisdiction by any such order, and the indictment is still pending in that court notwithstanding that order. The simple fact that the plea to the jurisdiction is sustained does not finally dispose of the case; and if the criminal court has jurisdiction of the offense charged we will compel the judge thereof to proceed with the cause, although he may be of opinion that his court has no jurisdiction and so alleges in his return. We are all of opinion that this is a proper case in which to issue the writ of mandamus, provided the criminal court has jurisdiction of the offense charged. Whether it has jurisdiction depends upon whether the offense charged is a felony, and whether said offense is a felony depends upon the constitutionality of the act of March 9th, 1881, above referred to.

All the objections to the validity of this law, save the one relating to the title of the act, are satisfactorily disposed of in the opinion of the judge of the criminal court, and it will be unnecessary, therefore, for us to say anything in regard to them. We will proceed to the title of the act.

Section 28 of article 4 of the constitution declares that: "No bill * * shall contain more than one subject, which shall be clearly expressed in its title." The title of the act of March 9th, 1881, is as follows: "An act to amend section 1547

2. CONSTITUTIONAL
LAW - title of act:
gambling.

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of article 8 of the Revised Statutes, relating to offenses against public morals and decency, or the public police, and miscellaneous offenses." The sections of the Revised Statutes, without regard to subject matter, are, in pursuance of law, numbered successively and without omission from the beginning to the end of the volumes. Article 8 of the chapter on crimes and punishments, in the Revised Statutes of 1835, is entitled, "Of offenses against public morals and decency, or the public police, and other miscellaneous offenses," and embraces the same class of offenses now grouped under precisely the same title in article 8 of the chapter on crimes and punishments in the Revised Statutes of 1879. Article 8 of the chapter on crimes and punishments in the Revised Statutes of 1845 has precisely the same title and embraces the same class of offenses. So in the Revised Statutes of 1855 the same title embraces the same class of offenses, and in the Revised Statutes of 1865, as also in Wagner's Statutes of 1872, the same title is employed to designate the same class of offenses. This title, therefore, is no new combination of indefinite terms, but from long usage, has come to have as definite a signification as the title "Of the assessment and collection of the revenue," or any other title which has been continuously used for one and the same purpose from the beginning of the State government. This court has repeatedly held that the provision of the constitution now under consideration should be liberally construed. In the *City of Hannibal v. The County of Marion*, 69 Mo. 571, speaking of this provision we said: "Its object, as has been repeatedly observed, was manifestly to prevent and prohibit fraudulent legislation, or, in other words, the enactment of provisions to which no attention was given by reason of their not being in reference to the subject indicated by the title. It was not the purpose, however, to require that the title of an act should refer literally to all the details which the general subject would suggest." Now the title of the act in question not only refers to the title of the article but to

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the particular section of that article sought to be amended; this constitutes the subject of the bill, and it is clearly expressed. The subject matter or contents of the section sought to be amended need not be stated in the title.

An additional reason for a liberal construction of this section of the constitution is, that in the next preceding section, (§ 27, art. 4.) it is provided that no bill can be passed by the legislature until it has been reported upon by a committee and printed for the use of the members. Similar titles have been upheld in other states having constitutional provisions like our own. The constitution of Kansas provides that "No bill shall contain more than one subject which shall be clearly expressed in its title." An act was passed in that state entitled "An act to amend sections 2, 4, 17, 41 and 59 of an act entitled," etc. Speaking of this act the supreme court of Kansas in *The State v. Bankers' Association*, 23 Kas. 501, said: "A certain subject is expressed in the title, *i. e.*, the amendment of five specific sections. So far as the act follows the title, it is without question; but it goes beyond, and after doing all that its title intimates that it will do, it reaches out for something entirely separate and independent." And in *People ex rel. Comstock v. Judge of Superior Court*, 39 Mich. 195, a statute similarly entitled, though criticised, was held to be valid; *vide also County Commissioners of Dorchester Co. v. Meekins*, 50 Md. 23.

The authorities, however, in our own State are conclusive upon this question. In the *State v. Ranson*, 73 Mo. 78, the constitutionality of an act having a title similar to that now under consideration, was upheld by this court. The discussion of the sufficiency of the title in that case was general, and there is nothing in the opinion to indicate a purpose on the part of this court to confine the ruling there made to acts passed at a revising session of the legislature for the purposes of revision. The case was not considered by this court in that aspect. That case, too, although not citing the case of the *City of Kansas v.*

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Payne, 71 Mo. 159, is in entire harmony with it. The title of the act passed upon in the latter case is as follows: "An act to amend sections 2, 3, 4, 5, 9, 11, 14, 17 and 18 of an act approved April 12th, 1877, entitled 'An act to provide for the collection of delinquent taxes due the State, and repealing section 184 of an act entitled an act concerning the assessment and collection of the revenue, approved March 30th, 1872.'" The sections amended relate to various matters, but they all appropriately fall under the general title. This title was held to be good in itself, but was declared to be insufficient to embrace a repeal of certain provisions of the charter of the City of Kansas, as it contained "no index to the legislative intent" to interfere with the city charter. The designation by number of the sections proposed to be amended was held to be sufficient, although the substance or purport of such sections was not set forth.

Being of opinion that the title of the act of March 9th, 1881, is sufficient, and the act, therefore, constitutional, and that the offense charged in the indictment herein referred to is a felony, a peremptory writ will be awarded. The other judges concur.

THE STATE *ex rel.* LAFAYETTE COUNTY V. O'GORMAN, *Appellant.*

1. **County Clerks: THEIR LIABILITY TO ACCOUNT FOR FEES.** The act of March, 1868, requiring the clerks of courts to render accounts and to pay into the county treasury all the emoluments of their offices beyond the allowances prescribed by the act, applied to the clerks of the county courts. Sess. Acts 1868 p. 54.
2. ———: ———: **JUDGMENT BINDING ON SURETIES.** Where a county clerk and the sureties in his official bond, being sued by the county for a surplus of fees alleged to be withheld from the treasury, defended on the ground that he had made and the county court had approved a statement and settlement of his accounts, and that by

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such settlement it appeared there was no surplus; *Held*, that a judgment of the circuit court setting aside such settlement as having been obtained by fraud was admissible in evidence, and was binding upon the clerk and his sureties alike.

3. **Limitations: NON-SUIT.** The statute which provides that a party who suffers a non-suit in an action commenced within the time prescribed by the statute of limitations, shall have the right to commence a new action within one year, applies as well to voluntary as to involuntary non-suits. R. S. 1879, § 3239.
4. **Official Bonds.** An official bond is binding upon all who sign it though it is not in the form prescribed by statute.
5. **Practice: HARMLESS ERROR IN ADMITTING EVIDENCE.** Where undisputed evidence fixed the amount of recovery at a sum greater than that for which plaintiff obtained judgment, *Held*, that error committed in admitting evidence of a further amount was no ground for reversal.
6. **Public Officers: SETTLEMENT OF ACCOUNTS: JURISDICTION.** Failure of an officer to comply with a law requiring him to settle his accounts with the county court, will give the circuit court jurisdiction in an action brought on his official bond, to investigate his accounts and make the settlement.

Appeal from Ray Circuit Court.—HON. G. W. DUNN, Judge.

AFFIRMED.

Alex. Graves for appellants.

Wallace & Chiles for respondent.

NORTON, J.—This suit was instituted in the Lafayette county circuit court on a bond executed by defendant O'Gorman as county clerk of said county with his co-defendants as sureties.

The petition set out at great length the cause of action, which being stripped of its verbiage substantially alleges that O'Gorman was elected county clerk of the county court of Lafayette county for four years, his term of office commencing on the 1st day of January, 1871, and ending on the 1st day of January, 1875; that before entering on his duties he executed the bond sued upon, in the penal sum of \$5,000, to be void on condition that he faithfully

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discharged all the duties of clerk of the county court in accordance with law ; that by virtue of an act of the general assembly passed March 21st, 1868, it became the duty of said O'Gorman at the end of each year to deliver to the judges or justices of the county court of said county a statement, under oath and in detail, showing the aggregate amount of fees received by him as clerk during the year last past, and to pay into the treasury, upon the order of the county court, the surplus remaining after deducting from the aggregate of fees received by him the sum of \$2,500, and such sums for deputies or assistants in his office as the court might allow ; that said O'Gorman did not, at the end of the years 1871, 1872 and 1873 comply with the requirements of said act, in making within the time prescribed, or at any time, a statement of the fees received by him, but on the contrary, and in evasion of the statute and with the design of cheating and defrauding the said county of Lafayette, by false representations, fraudulently deceived and procured the county court to direct and have entered on the records of said court by said O'Gorman the following false and fraudulent entries :

"Lafayette county court, January term, fourth day, January 4th, 1872.

"Now, at this day comes James O'Gorman, clerk of this court, and proves to the satisfaction of the court that the compensation received by him during the last year does not exceed that allowed by law."

And the following, to-wit :

"Lafayette county court, February term, fifth day, February 7th, 1873.

"Now, at this day comes James O'Gorman, clerk of this court, and makes his settlement of all fees received by him for the year 1872, which is by the court approved."

And the following, to-wit :

"Lafayette county court, May term, fourth day, May 14th, 1874.

"Now, at this day comes James O'Gorman and pre-

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sents to the court here, his statement proving to the satisfaction of the court that the amount of fees received by him does not exceed that allowed by law, said statement being for the year 1873, and which is by the court approved and ordered filed."

It is then averred that Lafayette county court instituted a suit for the purpose of vacating said orders, the venue of which being changed to the circuit court of Ray county, the cause was in that court tried at its February term, 1877, and a judgment rendered in March, 1877, vacating and overruling said orders on the ground that they were fraudulently obtained to be made by said O'Gorman; that afterward at the June term, 1877, of the Lafayette county court, the said court ordered a citation to be issued to said O'Gorman requiring him to appear at the July term of said court and make the statements required by the act of 1868, of the fees received by him for each of the years 1871, 1872 and 1873; that at said July term said O'Gorman appeared and filed his motion to dismiss the proceeding, which being overruled he declined and refused to make or file any statement or statements in regard to fees received by him during said years, and also declined further to appear to said proceedings, whereupon the court proceeded to ascertain the fees and emoluments received by said O'Gorman as clerk for each of said years, and found from the evidence, after deducting \$2,500 and allowing \$2,700 for deputies and assistants for each year, that for the year 1871 there was a surplus of \$2,404.39; for the year 1872, a surplus of 4,629.36, and for the year 1873, a surplus of \$2,583.77, which respective sums so found O'Gorman was ordered to pay into the county treasury.

The petition then assigns six breaches of the bond; and as the court found for defendants on the first, second, third and fourth breaches, it is only necessary to notice the fifth and sixth, upon which the finding was for plaintiff. The fifth breach in substance is, that defendant failed to make any statement as required by law of the fees received

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by him for the year 1872, that he had received for that year the sum of \$4,679.36 in excess of what he was entitled to retain as clerk, had not paid the same into the treasury, but had converted the same to his own use. The sixth breach was for O'Gorman's failure to account for the fees of the year 1873. It is also averred that plaintiff commenced an action against defendants on said bond, in the circuit court of Lafayette county on the 16th day of December, 1875, and assigned the same breaches as breaches five and six assigned in this suit; that defendants appeared to said action, and plaintiff on the 21st day of August, 1876, suffered a non-suit in said action.

Defendants O'Gorman and Allen answered separately, and each of them set up the statute of limitations as a bar to the plaintiff's suit. Defendant Aull also answered separately, and after pleading the statute of limitations, also set up that the county court had settled with said O'Gorman for all fees received by him for the years 1871, 1872 and 1873, and relied upon the orders made by said court and particularly set out in the petition of plaintiff for each of these years.

Plaintiff in his replication denies the new matter set up, and avers that the commencement of an action within the time prescribed by the statute was prevented by the fraudulent conduct of said O'Gorman in making fraudulent settlements with the county court, and avers that while a suit was pending to set aside and vacate said settlement and orders, plaintiff, on the 16th day of December, 1875, commenced an action on said bond, assigning the same breaches as set forth in breaches four, five and six, in the present suit; that defendants appeared to said action, and on the 12th day of August, 1876, plaintiff suffered a non-suit and commenced the present suit on the 19th day of July, 1877, within one year after such non-suit. It is also averred that the settlement and orders relied upon by defendant in his answer had been vacated and set aside as fraudulent by a decree of the Ray county circuit court, to

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which court a suit, commenced in Lafayette county circuit court for the purpose of setting aside and vacating said orders, had been transferred by a change of venue.

On the trial the court found for defendant on the first, second, third and fourth breaches assigned, and for plaintiff on the fifth and sixth breaches, and rendered judgment accordingly, from which defendants O'Gorman and Aull have appealed to this court. The record is a voluminous one, the pleadings covering twenty-eight pages of printed matter, and the instructions given and refused nearly sixteen pages. We will not go into a detail of the mass of matter thus presented, but will confine our examination to the vital points which the record presents.

The first ground upon which the correctness of the judgment is questioned by counsel is, that the 1st section 1. COUNTY CLERKS: of the act of March, 1868, (Acts 1868, p. 54,) their liability to account for fees. did not apply to county clerks, because said section required the statements therein referred to, to be made to the judge or judges of their said courts, and that as the persons composing the county courts are styled in the act creating them, justices of the county court, it was not, therefore, intended to include county clerks. This is, we think, an entire misconception of the section. It is as follows: "The clerks of the several courts established by the constitution or the laws of the State, shall, except as hereinafter provided, at the end of each year during their respective terms of office, deliver to the judge or judges of their said court, under oath or affirmation, a statement in detail showing the aggregate amount of all official fees and emoluments received by them as clerks during the year last past." The county court is a court established by law, and the clerk of such a court is, by the very terms of the act, required to make the statements therein mentioned, and the terms "judge or judges" can be understood in no other sense than as including county court justices. This is shown by the definition of the term. The word judge is defined by Bouvier to be, "A public officer lawfully appointed to

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decide litigated questions according to law. This, in its most extensive sense, includes all officers who are appointed to decide such questions, and not only judges properly so called but also justices of the peace and jurors, who are judges of the facts in issue. In its more limited sense the term judge signifies an officer who is so named in his commission and who presides in some court." The same author defines justices to be: "Officers appointed by a competent authority to administer justice. They are so called because in ancient times the Latin word for judge was *justicia*." In various sections of the statute the words judges and justices of the county court are used interchangeably and in the same sense, an example of which is to be found in the very act which declares that the members of the county court shall be styled "justices of the county court." Section 21 of said act, (Wag. Stat., 442,) provides that "it shall be lawful for judges or justices of the county court, not otherwise disqualified, in all counties of the State, to practice as attorneys and counselors at law in all courts, except the county court of which such person shall be a judge or justice, and in cases where the county is a party thereto."

It is also insisted that said act of 1868 does not apply to county clerks because the court which examines the statements required of a clerk is directed to make an order and cause the same to be certified to the county court of the proper county, requiring such clerk to pay the surplus which may be found in his hands after making the deductions authorized by the act, into the treasury of the county. Inasmuch as the duty of examining statements made by clerks was devolved not only upon county courts but other courts as well, and inasmuch as the act required the surplus found to be in the hands of the clerk making the statement, to be paid into the county treasury of the county, the provision referred to directing that the order made upon such clerk to pay into the county treasury such surplus, was intended to perform no other office than to put

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county courts in possession of information which would enable them to protect the interest of their respective counties in the event of the non-payment of any surplus which any clerk may have been ordered to pay. This being so, the requirement that an order when made must be certified to the county court, has no application to an order made by a county court upon its own clerk to pay into the treasury any surplus found to be in his hands. The objection taken is without foundation, as statutes are to be construed with reference to the object intended by their enactment, and that construction is to be adopted which makes sense rather than nonsense, when the act is susceptible of such construction.

It is also insisted that the court erred in allowing plaintiff to read in evidence the record and judgment rendered in the suit instituted against O'Gorman ^{2. ———: ———: judgment binding on sureties.} to vacate the orders made by the county court in 1872, 1873 and 1874; and that it also erred in holding that the effect of the judgment or decree vacating and setting aside said orders was to place O'Gorman, in contemplation of law, as if he had never made any of the statements he was required by law to make, and as if he had never by his affidavit or otherwise satisfied the county court that the fees and emoluments of his office for each of the years 1871, 1872 and 1873, did not exceed the sum of \$2,500. We perceive no error either in the admission of the decree in evidence or the judgment of the court in declaring its legal effect. In view of the fact that defendants claimed exemption from liability because of the orders made by the county court in 1872, 1873 and 1874, it was entirely competent for plaintiff to show that the orders thus relied upon had in fact been expunged from the record or vacated by competent legal authority. That the court rendering the decree read in evidence had the authority to render it there can be no question, and that the effect of the decree when rendered was to destroy utterly said order as a defensive shield, both as to O'Gorman and

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the sureties on his bond, we think is clear. The decree was not only binding upon O'Gorman but upon all who were in privity with him, and the sureties on O'Gorman's bond sustained that relation. *Walsh v. Agnew*, 12 Mo. 520; 1 Greenleaf Ev., § 523; *Cooley v. Warren*, 53 Mo. 166, 169.

It is also insisted that the court erred in not declaring that plaintiff's action was barred by the statute of limitations. It appears that in December, 1875, and within three years from the time plaintiff's cause of action accrued for the failure of O'Gorman to make statements for the years 1872 and 1873, plaintiff instituted a suit on his bond for such delinquency, and on the 12th day of August, 1876, suffered a voluntary non-suit, and on the 19th day of July, 1877, the present suit was instituted and the same breaches of the bond assigned that were assigned in the suit in which said non-suit was taken. It is insisted by counsel that inasmuch as it appears that the non-suit taken by plaintiff was a voluntary one, it, therefore, follows that the statute which provides that a party who suffers a non-suit in an action commenced within the time prescribed by the statute, may commence a new action within one year after such non-suit suffered, has no application. The contrary view has been taken by this court in the cases of *Shaw v. Pershing*, 57 Mo. 419, and *Briant v. Fudge*, 63 Mo. 489, and these cases fully sustain the action of the court in holding that the action of plaintiff as to the fifth and sixth breaches was not barred by limitation.

It is also insisted that the bond sued upon is not sufficient to bind defendants because it does not contain all the conditions prescribed by the statute. Conceding the bond not to be good as a statutory bond, the conclusion drawn from this fact by counsel by no means follows. If not good as a statutory bond, being voluntary, it is nevertheless good as a common law bond, and the parties executing it are bound by all the conditions it contains, and to the full extent of such conditions. 16 Mo.

3. LIMITATIONS:
non-suit.

4. OFFICIAL BONDS.

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258; *West v. Thompson*, 49 Mo. 188; *State to use v. Thomas*, 17 Mo. 503; *Gatherright v. Callaway Co.*, 10 Mo. 663; 7 Mo. 458. The condition of the bond sued upon is, "that said O'Gorman shall discharge all the duties of clerk of the county court * * in accordance with law." This condition of the bond is broad enough to require of defendant O'Gorman the performance of every duty which the law cast upon him as county clerk, as much so as if they had been specifically set forth in the bond. *State ex rel. Mississippi Co. v. Moore*, 74 Mo. 413, and cases cited.

It is also insisted that the court erred in admitting the evidence of Auditor Holladay and his clerk, establishing the receipt of certain fees by O'Gorman from the State. Conceding that this evidence was improperly received, the error committed in no way affects the merits of the controversy, as the undisputed evidence shows that from other sources O'Gorman received fees for the years 1872 and 1873, properly payable into the county treasury, largely in excess of the penalty of the bond.

The point made that the circuit court had no jurisdiction to determine what amount of surplus remained in O'Gorman's hands for the years 1872 and 1873, after deducting the allowances authorized to be made him, is not well taken.

When a county clerk, of whom such statements are required, fails to make them, he thereby commits a breach of his bond, and in a suit to recover damages for such breach it is entirely competent for the court in which it is pending to ascertain all the facts, and make the settlement which the delinquent officer, by reason of his delinquency, prevented the county court from ascertaining or making.

Other points made by counsel and not herein specially noted, are as groundless as those we have particularly noticed, and perceiving no error affecting the merits of the case, we affirm the judgment, in which all concur.

5. PRACTICE: harmless error in admitting evidence.

6. PUBLIC OFFICERS: settlement of accounts: jurisdiction.

The Union Bank of Trenton v. Dillon

THE UNION BANK OF TRENTON V. DILLON *et al.*, Appellants.

Garnishment: PLEADING AND PRACTICE. In garnishment proceedings the plaintiff's denial of the garnishee's answer to interrogatories stands in the place of a petition, and its sufficiency is to be tested by the same rules, both in respect to pleading and practice. If the garnishee demur to the denial for misjoinder of several matters in one count, and after the demurrer is overruled, answers over, he will be held to have waived the defect.

Appeal from Mercer Circuit Court.—HON. G. D. BURGESS,
Judge.

Hall & Harber for appellants.

DeBolt & Winslow for respondent.

HOUGH, J.—This is an action by attachment, in which Frances A. Dillon was summoned as garnishee, and filed answer stating that she had no property, money or effects of any character belonging to the defendant in her possession or under her control, and that she was not indebted to the defendant in any sum then due, or to become due; that about the 1st day of January, 1877, she purchased the defendant's interest in his father's estate for the sum of \$1,200, and for \$1,080 of that sum she executed four promissory notes to said defendant, which were by him transferred to various parties as collateral security for money borrowed by him; that before the service of the garnishment, the defendant became insolvent, and said garnishee became and was liable to the persons holding said notes as collateral security for the amount of their debts; and that defendant was indebted to her in the sum of \$280 for certain property furnished by her to the defendant, and for rent.

To this answer the plaintiff filed the following denial:

Comes now the plaintiff, and for denial to the answer of Frances A. Dillon, garnishee in this cause, states that on or about January 1st, 1877, Frances A. Dillon purchased of Wm. F. Dillon, the defendant, all his interest

of, in and to the estate of his father, Wm. P. Dillon, deceased, for which she then and there agreed to pay said Wm. F. Dillon the price and sum of \$1,200, for which Frances A. Dillon and J. R. Dillon executed and delivered to said Wm. F. Dillon their four promissory notes, by which they promised, for value received, to pay said Wm. F. Dillon the sum of \$1,080, which notes cannot be here filed because they are held by the order, and are under the control, of the circuit court of Grundy county, and are not in the possession of the plaintiff. One of said notes is for \$275, dated January 1st, 1877, due twelve months after date; one for \$275, dated March 1st, 1877, due in twelve months after date; one for \$350, dated August 1st, 1877, due in one year after date; one for \$180, dated September 15th, 1877—all bearing interest from date at ten per cent, all of which said notes, and all the purchase money for said estate, is yet due the defendant, and for which plaintiff asks judgment. Plaintiff for further denial of said answer, denies each and every allegation therein contained, except as herein admitted.

To this denial of the plaintiff, the garnishee filed a demurrer, which was overruled, and she thereupon filed a reply in which she admitted the execution of the notes, and put in issue all other allegations of said denial. There was a verdict and judgment for the plaintiff for \$181.50, from which the garnishee has appealed.

The bill of exceptions in this case having heretofore been stricken out on motion, no errors, if any, occurring at the trial, are subject to review, and the only question presented for determination which we can properly consider is, whether the plaintiff's denial of the garnishee's answer contains a sufficient statement of the grounds upon which a recovery is sought against the garnishee, to support the judgment; in other words, whether, when viewed as a petition, it states facts sufficient to constitute a cause of action. The statute provides that the issues made upon the denial, and the reply, shall be the sole issues tried, and

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such issues shall be tried as ordinary issues between plaintiff and defendant.

If the denial of the garnishee's answer set forth an indebtedness of the garnishee to the defendant on any one of the notes herein described, omitting the others, it would undoubtedly be held, after judgment, to be a sufficient statement of a cause of action. Indeed, the only objection made to the sufficiency of the plaintiff's statement of the garnishee's indebtedness, is, that it improperly unites, in the same count, several separate and distinct causes of action. It was formerly held by this court that when several causes of action founded upon distinct contracts, were united in the same count, the judgment would be arrested. *Hoagland v. R. R. Co.*, 39 Mo. 451. But this decision was expressly overruled by the case of *House v. Lowell*, 45 Mo. 381, and this case was subsequently affirmed in the case of *Pickering v. M. V. Nat. Telegraph Co.*, 47 Mo. 457. In each of these cases it was held that such a defect cannot be taken advantage of by motion in arrest. In the case before us the garnishee did demur, but she abandoned the demurrer by answering over. *Pickering v. Telegraph Co.*, *supra*.

Perceiving no error in the record proper, the judgment will be affirmed. All concur.

THE STATE V. CHAMBERLAIN, *Appellant*.

Forgery: PLEADING, CRIMINAL. An indictment for forgery of a promissory note, describing the note as payable to J. M. Willard, is not sustained by evidence that defendant forged a note payable to J. C. Willard. The variance in the name is fatal.

Appeal from Sullivan Circuit Court.—HON. G. D. BURGESS,
Judge.

REVERSED.

A. W. Mullins for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—Defendant was indicted for forgery in the circuit court of Sullivan county, and upon trial was convicted and brings his cause to this court by appeal. Among other errors assigned is the action of the court in refusing the following instruction: "If the jury find from the evidence that the note alleged in the indictment to be forged was drawn payable to J. C. Willard instead of J. M. Willard, then they must acquit on this indictment." The indictment does not set out the note alleged to have been forged in *haec verba*, but avers that it purported to be a note for \$100 executed and signed by Thomas Montgomery, payable nine months after date to J. M. Willard, bearing ten per cent interest from date. Under the authority of the cases of *State v. Fay*, 65 Mo. 490, and *State v. Smith*, 31 Mo. 120, the instruction asked should have been given, and for the error committed in refusing it the judgment will be reversed and cause remanded, in which all concur, except SHERWOOD, C. J.

BOOGHER V. NEECE *et al.*, Appellants.

1. **Deeds: COPY OF RECORD AS EVIDENCE: WAIVER.** A certified copy of the record of a deed acknowledged in conformity to the laws of the Territory of Missouri in force when the acknowledgment was taken, may be admitted in evidence, without proof of the loss or destruction of the original. Under section 30 of the chapter on conveyances, (R. S. 1879, § 697,) an affidavit that the original is not in the power of the party offering the copy, is all that is necessary, and this will be deemed to be waived if the adverse party fails to object at the trial for want of such affidavit.
2. **Quit-claim Deed: RECORD OF DEEDS.** A quit-claim deed will pass

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the title of the grantor as against a prior unrecorded deed from the same grantor, provided the grantee have no notice of the prior deed.

3. **Questions of Law:** INSTRUCTIONS. Instructions which leave it to the jury to determine what facts constitute adverse possession or color of title, are properly refused.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS,
Judge.

AFFIRMED.

This was an action of ejectment for a tract of military bounty land in Carroll county. Plaintiff showed a patent from the United States to Wm. Clarke, a soldier of the war of 1812, a certified copy of the record of a deed from Clarke to Romulus Riggs, dated May 19th, 1819, recorded July 24th, 1820, and acknowledged in Pennsylvania on the day of its date in conformity with the laws of the Territory of Missouri, then in force, and a regular chain of conveyances from Riggs to Dameron, from whom plaintiff derived title by inheritance. Among these conveyances was a quit-claim deed from Conway to Barton for the consideration of \$1, dated May 16th, 1856, and recorded June 28th, 1866. Defendants, on their part, offered evidence to show title in themselves by adverse possession, and also offered a deed from Conway to Wharton Rector, dated October 26th, 1826, but not recorded in Carroll county until 1873.

Defendants asked and the court refused the following declarations of law:

2. A quit-claim deed passes the title as the grantor therein held it, and the grantee in such deed takes only such title as the grantor could lawfully convey; and the deed from Conway to Barton, dated in 1856, which was read in evidence, being only a quit-claim deed for a nominal consideration passed to said Barton only such title as Conway could at that time lawfully convey; and if Con-

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way prior thereto had conveyed said land to Wharton Rector, then no title passed by the deed to Barton.

3. The deed from Conway to Barton being a quit-claim deed for a nominal consideration cannot prevail over the unrecorded deed from Conway to Rector made prior thereto; and said Barton claiming under such deed cannot be considered an innocent purchaser for a valuable consideration without notice.

4. The record of the deed from Conway to Rector, which was read in evidence, shows that at the commencement of this suit, the title to the land in question was outstanding, and plaintiff cannot recover.

5. If the defendants were in the adverse possession of the land in question under claim and color of title for two years next before the commencement of this suit, the plaintiff cannot recover.

There was a verdict and judgment for plaintiff, and defendants appealed.

L. H. Waters for appellants.

Hale & Eads for respondent.

HOUGH, J.—The record of the deed from Wm. Clarke, patentee, to Romulus Riggs, dated May 14th, 1819, recorded July 24th, 1820, and acknowledged in Pennsylvania on the day of its date in conformity with the laws of the Territory of Missouri, then in force, was properly admitted in evidence. It was unnecessary to make proof of the loss or destruction of the original, inasmuch as the deed was acknowledged according to the laws then in force here, and under section 30 of the chapter on conveyances, (Wag. Stat.) a certified copy can be used as evidence upon making affidavit that the original is not within the power of the person wishing to use the same. No objection was made when this deed was offered in evidence that such affidavit had not been made, and it is competent for a party to waive the necessity for such affidavit.

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The second, third and fourth instructions asked by the defendants, were properly refused. They declare in substance, that a quit-claim deed offered in evidence in the plaintiff's chain of title, was insufficient to pass the title of the grantor therein as against a prior unrecorded conveyance from the same grantor. These instructions contain no qualification as to notice of such unrecorded conveyance, on the part of the grantee in the quit-claim deed, and are, therefore, in conflict with the recent decision of this court in *Fox v. Hall*, 74 Mo. 315.

Instruction numbered five, was properly refused for the reason that it left it to the jury to determine what constitutes adverse possession and also what constitutes color of title. These were questions of law to be determined by the court with reference to the facts offered in evidence. The judgment of the circuit court will be affirmed. The other judges concur.

NEILSON *et al.*, Appellants, v. SASSE.

1. **Sheriff's Deed Under School Mortgage.** A sheriff's deed executed in pursuance of a power conferred by a mortgage to the county, will be held void if it fails to recite sufficient authority for making the sale, and it does not otherwise appear that there was such authority.
2. **Mortgage: RIGHT OF REDEMPTION.** In a suit to redeem land sold under a mortgage, the defendant relied, for a defense, on the fact that he had from time to time since his purchase made improvements in good faith and with the knowledge of the mortgageor and without objection on his part. It was shown, however, that the improvements were but usual and customary repairs, not exceeding the rents in value, and that there was no material change in the value of the property. Defendant was the purchaser at the mortgage sale, and there had been no loss of evidence preventing a full presentation of the case. *Held*, that there was nothing to defeat plaintiff's right of redemption.

Appeal from Chariton Circuit Court.—HON. G. D. BURGESS,
Judge.

REVERSED.

Chas. Hammond for appellants.

A. W. Mullins for respondents.

HOUGH, J.—This is a suit to redeem a certain town lot from a mortgage made to the county of Chariton under the statute authorizing the county to loan certain school funds. The case was before us on a former occasion. The opinion then delivered is to be found in 60 Mo. 386. The pleadings now are substantially the same that they then were. It was then decided that the plaintiff had ten years in which to bring his action. We adhere to that decision.

The deed under which the defendant claims title is invalid. It recites no sufficient authority for making the sale, (*Carter v. Reeves*, ante, p. 104,) and it does not otherwise appear that he had such authority.

The defense made against the right of the plaintiff to redeem is, that Sasse, soon after his purchase under the mortgage, and from time to time until the institution of this suit, made lasting and valuable improvements on the property in question, in good faith and with the knowledge of Neilson, and without objection on his part, and that he should not now be heard to assert any claim to the property. The property in controversy is a store house in the town of Brunswick, and the improvements made were in the nature of usual and customary repairs, and their value does not appear to exceed the value of the rents. The property has not passed into the hands of *bona fide* purchasers, and there has been no loss of evidence preventing a full presentation of the case, and no material change in the value of the property. Under such circum-

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stances, we think the plaintiffs have a clear right to redeem.

Besides, the mortgage in question covered property of the defendant Sasse, adjoining the property in controversy, and it is alleged in the petition that Sasse is in equity bound for a portion of the mortgage debt, for which the plaintiffs' property was sold. It may be that the mortgage debt should be apportioned between the plaintiffs and Sasse according to their several interests in the whole property mortgaged; but we are unable to determine this point from the facts now before us.

The judgment will be reversed and the cause remanded with directions to the circuit court to take an account between the parties, and to enter a decree permitting the plaintiffs to redeem upon the payment of such sum, if any, as may be found to be due from them to the defendant. All the judges concur.

WILLIAMS, *Superintendent of the Insurance Department*, v.
THE COMMERCIAL INSURANCE COMPANY *et al*,
Plaintiffs in Error.

1. **Insurance Companies can not make Assignments.** An insurance company can not, even with the consent of the stockholders, make a valid voluntary assignment of its property, and thus withdraw itself and its property from the control of the Insurance Department of the State, after it has violated the laws made for the regulation of insurance companies. Such an assignment would be in fraud of those laws. Before suit is brought by the Superintendent of the Insurance Department, under the statute, an insurance company whose capital stock is impaired may make itself sound; but while it attempts to do business upon an unsound basis, it is acting in fraud of the law; and while it fails to repair the deficiency, the interests of the policy-holders and the public are, by the law, intrusted to the court of equity under provisions created for the case, and the jurisdiction of the court cannot be ousted at the will of the offender. The State is a party to the proceeding, and a full

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exposure of frauds, if any exist, is essential to the purposes of State in enacting the law.

2. —. The legal results of fraud upon the law cannot be indirectly avoided. Though the law relates only to "insurance companies doing business in this State," a company, having violated and acted in fraud of the law while doing business in this State, cannot avoid its penalties by making an assignment, or by ceasing to take new risks, or by any other subterfuge resorted to for the purpose of evading the provisions of the statute for exposure and punishment.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

A. J. P. Garesche and F. J. Bowman for plaintiffs in error.

R. E. Rombauer and Wm. S. Relfe for defendant in error.

HOUGH, J.—We have carefully examined the record and briefs of counsel in this cause, and being entirely satisfied with the conclusion reached by the court of appeals, as well as with the reasoning by which that conclusion was arrived at, we are all of opinion that its judgment should be affirmed.

THE STATE, *Appellant*, v. BRUFFEY.

Burglary and Larceny: INDICTMENT IN ONE COUNT: AUTERFOIS ACQUIT. Where a defendant indicted for burglary and larceny in one count, as permitted by the statute, is acquitted of one and convicted of the other, the acquittal is conclusive upon that branch of the charge. If the conviction be afterward set aside, a new trial will be ordered only upon the other branch. R. S. 1879, § 1301.

*These syllabi are taken from 5 Mo. App. 173, where the case is reported *sub nom. Relfe, Superintendent, etc., v. Commercial Insurance Co.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

The old rule as laid down in *State v. Ross*, 29 Mo. 32, and *State v. Smith*, 53 Mo. 139, has been changed by the constitution of 1875. Art. 2, § 23. Now, when judgment in a criminal case is arrested for error at law, the trial is to be regarded as a mis-trial, and when remanded the whole case is to be tried anew. *State v. Simms*, 71 Mo. 538. So it is held elsewhere. *State v. Stanton*, 1 Ired. 424; *State v. Commissioners*, 3 Hill (S. C.) 239; *Lesslie v. State*, 18 Ohio St. 390. The granting of a new trial has the same legal effect as a reversal and remanding of the case, and the party accused stands precisely in the same position as if there had been no trial. *Ex parte Bradley*, 48 Ind. 556. The defendant by asking for a new trial waives all constitutional rights and asks that the whole verdict may be set aside. The verdict is an entirety. It cannot be separated and a part be set aside and a part sustained by this motion. *People v. March*, 6 Cal. 543; *People v. Howell*, 28 Cal. 456; *State v. Redman*, 17 Iowa 329; *State v. Knouse*, 33 Iowa 365; *State v. Morris*, 1 Blackf. 37.

F. D. Turner for respondent.

Burglary and larceny are two separate and distinct offenses, and may be charged in the same or separate counts of the same indictment. *State v. Alexander*, 56 Mo. 131; Rev. Stat., § 1301. Offenses of equal grade cannot merge, and, therefore, the doctrine of merger cannot apply, if both are felonies or both misdemeanors. 1 Wharton A. C. L., § 564; 2 Bouvier Law Dict., 175; 2 Russell on Crimes, 433. Burglary and grand larceny being under the provisions of the Revised Statutes, distinct felonies of the same grade, and subject to the same nature of punishment,

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are not subject to the doctrine of merger, and the acquittal of the burglary expunged that charge from the indictment. *Bell v. State*, 48 Ala. 685; *Campbell v. State*, 9 Yerg. 333; *Jones v. State*, 13 Texas 184; *Swinney v. State*, 8 Sm. & M. 585; *Esmon v. State*, 1 Swan 14; *Shepherd v. People*, 25 N. Y. 416; *State v. Tweedy*, 11 Iowa 350; *State v. Martin*, 30 Wis. 216; *People v. Gillmore*, 4 Cal. 376; *Lithgow v. Com.*, 2 Va. Cases 311; *State v. Kittle*, 2 Tyler 471; 1 Bishop C. L., (4 Ed.) 849.

RAY, J.—The respondent, George Bruffey, was indicted at the January term, 1881, of the St. Louis criminal court for burglary in the second degree and larceny. The indictment contained but one count. He was tried at the same term of court and acquitted of the burglary but convicted of the larceny, his punishment being assessed at two years in the penitentiary. His motion for new trial was sustained, and at the March term, 1881, he was retried upon the entire indictment, convicted of both burglary and larceny, and his punishment assessed at five years in the penitentiary, three years for the burglary and two for the larceny. The first verdict specially acquitted of the burglary. The defendant appealed from the judgment of the criminal court to the St. Louis court of appeals, where that judgment was reversed as to the burglary and affirmed as to the larceny. From the judgment of the court of appeals the circuit attorney, for the State, appealed the case to this court. The only question presented for the consideration of the court is, whether the defendant could be held to answer for the burglary upon the second trial, after having been acquitted of that charge upon the first trial.

We have given the record in this case, as well as the briefs of counsel and the authorities cited, a careful examination, and are unable to find any error in the judgment of the St. Louis court of appeals reversing that of

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the St. Louis criminal court as to the burglary in question, and affirming it as to the larceny.

The opinion of the St. Louis court of appeals, delivered by LEWIS, P. J., we find in the record, and it reads as follows :

“ The defendant was indicted for burglary and larceny, both offenses being charged in one count. Upon trial before a jury he was convicted of the larceny, but acquitted as to the burglary. His motion for a new trial was sustained, and at a subsequent term he was again tried on the same indictment and found guilty of both burglary and larceny. It is assigned for error that the defendant could not lawfully be convicted of burglary on the second trial, after his acquittal of that offense on the first. Burglary and larceny are two distinct, separate and independent offenses. The statute, (R. S., § 1301,) permits a prosecution for both in the same count, or in separate counts of the same indictment, but nowhere intimates that the two may be regarded as one offense. On the contrary, provision is made in the same section for a separate assessment of punishment for each of the two crimes. In *State v. Alexander*, 56 Mo. 131, the defendant was convicted of burglary and larceny in one proceeding. The Supreme Court affirmed the judgment as to the larceny, and reversed it as to the burglary. If there had been two indictments, one for each of the crimes charged, and two separate trials, it will hardly be questioned that the granting of a new trial in the one case would not re-open a verdict of acquittal in the other. Such an acquittal would be a perpetual bar under article 2, section 23, of our State constitution : ‘ *

* Nor shall any person after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty.’ We are unable to perceive how the general assembly can, by a statute regulating criminal procedure, deprive any citizen of a constitutional right. No such effect was intended, and none can follow a law which simply provides for the trial of two offenses charged under

one indictment. The prosecution for burglary, in this case, was ended forever by the verdict of not guilty.

It is claimed for the State that the familiar constitutional rule has been changed by a provision in the section above referred to that 'if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.' This provision has no application whatever to the question before us. As to the 'offense' touching which defendant claims constitutional exemption from second trial, there was no 'verdict of guilty,' and no arrest of judgment, or reversal of such verdict for error of law or otherwise. The constitutional exemption distinctly applies to the *offense* and not merely to the procedure. There was a verdict of guilty as to the offense of larceny, and no doubt exists that the second trial upon that charge was proper upon well established principles.

We are referred to *State v. Simms*, 71 Mo. 538. In that case it was held that where a conviction of murder in the second degree on an indictment charging murder in the first degree, has been set aside, the defendant may, under the present constitution, be tried a second time for the murder in the first degree. There the indictment charged but one offense: Murder, including all the grades. The prisoner was found guilty of that offense, though in a degree inferior to the charge. The effect was very different from that of a conviction for a totally different offense, which the statute might have permitted to be tried by the same jury. No lawyer will say that larceny is a grade of burglary, or *vice versa*. We find nothing in this decision to disturb our conclusions in the present case."

This opinion of the St. Louis court of appeals, with its reasoning, conclusiveness and citation of authorities, we have also carefully considered and examined, and deem it a just, true and faithful exposition and presentation of

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the law of the case, with which we are well satisfied. The judgment, therefore, reversing the judgment of the St. Louis criminal court, as to the burglary in question, and affirming it as to the larceny, is in all things affirmed. All the judges concur.

WADE V. HARDY, *Appellant*.

1. **Instructions.** No issues should be submitted by the instructions but such as are made by the pleadings.
2. **Presumption of Settlement of Demands.** Where it was conceded by the pleadings that the consideration of a note given upon a settlement between the plaintiff's intestate and defendant, was services rendered by the intestate; *Held*, that this rebutted the presumption which would otherwise have arisen that the settlement embraced all the demands between the parties.
3. **Witness: PARTY TO CONTRACT, OTHER PARTY BEING DEAD.** Where an administrator is a party to an action upon a contract made by his intestate, the adverse party will be admitted to testify in his own favor as to matters which have occurred since the appointment of the administrator. Qualifying *Ring v. Jamison*, 66 Mo. 424, and *Wood v. Matthews*, 73 Mo. 482.

Appeal from Pettis Circuit Court.—HON. WM. T. WOOD,
Judge.

REVERSED.

John F. Philips for appellant.

G. C. Heard and *G. P. C. Jackson* for respondent.

HOUGH, J.—This was an action on a promissory note executed by the defendant to the plaintiff's intestate, W. T. Edelen, on the 1st day of January, 1878, for the sum of \$1,800, payable one day after date, with ten per cent interest, and also on an account for \$25 for services rendered

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by said intestate as clerk in defendant's store from January 1st to January 10th, 1878.

Defendant admitted the indebtedness alleged, but by way of counter-claim set up that the defendant, for a number of years, had been engaged in the mercantile business at Knob Noster and Lamonte, Missouri; that he employed said Edelen as his agent to take charge of and conduct the business of said store at Lamonte; that, by the terms of said employment, it was agreed and understood between them that said Edelen was to sell goods for cash, and not otherwise; that said Edelen promised and agreed not to sell the goods upon a credit, and that if said Edelen did sell on a credit, it was at his own risk; that the consideration of the note and account sued on was for the wages of Edelen under said employment. It further averred that said Edelen, in violation of said agreement and instructions, sold a quantity of defendant's goods on a credit, for a part of which he took notes amounting to \$976.26, and the remainder was accounts to the amount of \$658.56, an itemized list of which was filed with the answer; which sums it was averred had not been paid to defendant; for which he asked judgment, and prayed that the same might be recouped out of the sum sued on.

The reply denied the facts constituting the counter-claim set up in the answer, and averred that on the 1st day of January, 1878, said intestate and the defendant had a full, final and complete settlement and adjustment of all matters and transactions between them up to that date, and that the defendant thereupon made the note sued on.

Testimony was offered by the respective parties tending to establish the allegations contained in the answer and reply. The defendant also offered evidence tending to show that most of the parties owing the notes and accounts referred to in his answer were insolvent. The plaintiff and another witness were permitted to testify as to various acts and statements of the defendant relating to the matters in controversy done and made after the grant of letters

of administration to the plaintiff. The defendant offered himself as a witness for the purpose of testifying in relation to the acts and statements attributed to him by the plaintiff and said other witness, after the grant of letters as aforesaid, but was not permitted to testify.

The court gave the following instructions for plaintiff:

1. The note and account sued on by plaintiff are admitted; and in order to deduct therefrom the counter-claim set up by defendant, the jury must believe from the evidence in the case, either that by the contract of employment of Edelen by defendant, it was mutually agreed between them that Edelen should sell for cash only, or that during the employment defendant instructed Edelen not to sell on credit, but for cash only, and that notwithstanding such contract or instructions Edelen did sell goods on credit, and that the notes and accounts mentioned in the counter-claim are for sales made by Edelen on credit, and that the same are still unpaid to defendant.

2. Even if you believe that Edelen sold goods for the defendant on credit in violation of the instructions of defendant, yet if you further believe from the evidence that afterward defendant, with full knowledge thereof, acquiesced in and ratified the said credit sales, then it has the same effect as though he originally authorized them to be made.

3. To ratify the acts of Edelen, it is not necessary that there should have been any positive or direct confirmation by defendant. You are authorized to find a ratification from the acts and conduct of the defendant relating to these matters, if you are satisfied from such acts and conduct of defendant that he intended and did ratify the acts of Edelen.

4. Even if you believe that Edelen sold goods for the defendant on credit, in violation of instructions, yet if you further find that Edelen and defendant had settlements of the matters and business between them, including matters now in suit; that defendant had full knowledge of the

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matters set up in his answer; that, on a settlement with Edelen, defendant made the note now in suit, and that he took into his possession and management the notes and accounts for goods sold on credit, you are authorized to find that there was a ratification of the acts of Edelen as defendant's agent.

5. If the jury find from the evidence that on or about the 1st day of January, 1878, Edelen and defendant had a settlement between them of the matters pertaining to the employment of Edelen by defendant, and of his management of defendant's business up to said time; and that at said time, in pursuance of said settlement, defendant executed to Edelen the note in suit, for the amount agreed by said parties to be then due Edelen, and that at said time defendant had knowledge of the matters complained of in his counter-claim, then it devolves upon defendant to show to your satisfaction, that the said matters complained of in his said counter-claim were not embraced in and adjusted by said settlement.

6. It devolves on defendant to establish to your satisfaction, from the evidence in the case, the defense he has set up in his answer, and unless he does so, you should find for plaintiff upon both counts of the petition, making a separate finding of the amount you may find to be due on each count.

The following instructions were asked by the defendant:

1. If the jury believe from the evidence that defendant employed Edelen to manage and conduct defendant's store at Lamonte, with directions to sell goods for cash, and not on credit, and that Edelen, notwithstanding, did sell defendant's goods on credit, on his own responsibility, then he became liable to defendant for all such goods so sold and not paid for.

2. If the jury believe from the evidence that defendant employed Edelen to manage and conduct defendant's store at Lamonte, with instructions not to sell the goods on

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credit, and Edelen did sell goods on credit, assuring defendant that he would be responsible to him for the same, then, although defendant may have known that Edelen was selling the goods on credit, such fact did not relieve him from liability to defendant for losses occasioned thereby.

3. If the jury find from the evidence that Edelen did sell defendant's goods on credit, under the circumstances and conditions stated in the foregoing instructions, then the jury will deduct from the amount found to be due and owing on the claim of plaintiff against defendant, such sum as they may find represents the amount of insolvent debts so created by Edelen, as well as those created by the clerks under him, if they believe from the evidence that said clerks were acting under the control of Edelen in selling said goods on credit.

4. If the jury find that defendant employed Edelen to manage his store, and sell goods for him, under the instructions and the conditions stated in the foregoing instructions, and Edelen did sell defendant's goods on credit, with the agreement and understanding between them, that Edelen would be responsible to him for all such debts thus created, then, although the jury may further find that defendant gave Edelen the note sued on, in settlement of what defendant owed him up to the 1st day of January, 1878, yet such fact did not release Edelen from accountability to defendant for such losses as might result to him from such sales on credit; unless the jury further find from the evidence that the matter of such accountability and losses was taken into the account between them, at the time of making said note, and was settled between them; (and it devolves upon plaintiff to establish, by evidence, the fact of such settlement of Edelen's liability, and unless plaintiff has established this fact to the satisfaction of the jury, they will find such issues for defendant.)

5. It stands admitted by the pleadings that the consideration of the note sued on is for the wages of Edelen

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for the years 1876 and 1877, in the store of defendant.

The court gave the first, second, third and fifth of said instructions, and refused the fourth, as asked, but gave the same, except the following, at the conclusion, to-wit: "And it devolves upon plaintiff to establish by evidence the fact of such settlement of Edelen's liability, and unless plaintiff has established this fact to the satisfaction of the jury, they will find such issues for defendant."

No question seems to have been made at the trial as to the applicability of the statute of frauds to the undertaking of the plaintiff's intestate to be responsible for the sales made by him on credit as set up in the defendant's answer, and it is, therefore, unnecessary for us to say anything in regard to that phase of the case. The appellant complains chiefly of the action of the trial court in submitting to the jury the question of the ratification by defendant, of Edelen's act in making sales on credit, and of the refusal of the court to declare that the burden of proof was upon the plaintiff to show that the matters set up as a counter-claim were adjusted and settled at the time of the execution of the note sued on, and the refusal of the court to permit the defendant to testify.

The court erred in submitting the question of ratification to the jury in the instructions given for plaintiff. No
 1. INSTRUCTIONS. such issue was made by the pleadings. *Capital Bank v. Armstrong*, 62 Mo. 59; *Currier v. Lowe*, 32 Mo. 203.

The answer alleged an agreement by which Edelen was to be responsible for all credits given, and the reply denied any such agreement was ever made.
 2. PRESUMPTION OF SETTLEMENT OF DEMANDS. The allegations of the answer necessarily imply that the defendant consented that Edelen might sell on credit provided he would consent to become responsible for the punctuality and solvency of the persons to whom he should so sell; and it does not necessarily follow that the defendant released Edelen from all liability on account of such sales, simply because he had full knowledge thereof

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and acquiesced in the same. The burden of proof was on the plaintiff to show that all claims, if any, in favor of the defendant, arising out of sales made on credit by Edelen, were settled and adjusted by the parties at the time of the execution of the note sued on; inasmuch as it was admitted by the plaintiff, in his reply, that said note was given by the defendant in consideration of the personal services of Edelen while in his employment. This statement repels the presumption, which would otherwise arise from the execution of the note, that there had been an accounting and settlement of all demands between the parties. *De Freest v. Bloomingdale*, 5 Denio 305; *Lake v. Tysen*, 2 Seld. 462, 463. Had the reply simply alleged that the note was given upon a settlement, and the testimony tended to show that there had been a settlement, then it would have devolved upon the defendant to show that the demand now set up by him was not included in that settlement. *Perry v. Roberts*, 17 Mo. 36. It follows that the concluding paragraph of the fourth instruction, as asked by the defendant, should have been given.

We are further of opinion that the court erred in refusing to permit the defendant to testify as to the acts and statements attributed to him by the plaintiff

3. WITNESS: party to contract, other party being dead.

and Brumley, after letters of administration were granted to the plaintiff. Section 4010 of the Revised Statutes provides that "where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the * * * appointment of the administrator." Under the construction given to this section by this court in the cases of *Poe v. Domic*, 54 Mo. 123; *McGlothlin v. Hemry*, 59 Mo. 213, and *Martin v. Jones*, 59 Mo. 181, the defendant was a competent witness to disprove or explain the conversations which the plaintiff and Brumley testified they had with him. Statutes like ours have been

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similarly construed in other states. *Palmer v. Kellogg*, 11 Gray 27; *Howe v. Merrick*, 11 Gray 129; *Lincoln v. Lincoln*, 12 Gray 45; *Cronan v. Cotting*, 99 Mass. 334; *Merrill v. Pinney*, 43 Vt. 605. We deem it to be both against the letter and the spirit of the statute to permit an administrator, who is plaintiff in a suit, to testify to a conversation had by him with the defendant in such suit, affecting the right of plaintiff to recover, and to prohibit such other party from giving his version of such conversations; and the same rule should apply to the testimony of third parties in relation to the acts, statements or admissions of the defendant. In so far as the cases of *Ring v. Jamison*, 66 Mo. 424, and *Wood v. Matthews*, 73 Mo. 482, are in conflict with the cases cited and the views here expressed, they are disapproved.

The testimony of Hemphill as to what Brumley said was hearsay, and should have been excluded. The defendant was entitled to conclude the argument before the jury. The judgment will be reversed and the cause remanded. The other judges concur.

DONOHO V. THE VULCAN IRON WORKS *et al.*, Appellants.

1. **Municipal Corporation: DEFECTIVE STREETS: INFANCY.** A city cannot escape liability for injuries sustained by a boy in one of its public streets through its negligence, by showing that the boy was playing in the street and not traveling on it.
2. **Infancy: CONTRIBUTORY NEGLIGENCE.** The youth and lack of discretion of an infant plaintiff are matters to be considered by the jury in determining the question of contributory negligence.
3. **St. Louis: LIABILITY FOR IMPUTED NEGLIGENCE: PROPER PARTIES UNDER THE CHARTER OF 1876.** Section 9 of article 16 of the present charter of the city of St. Louis, rightly construed, means that where the city is liable to an action on account of the negligence or wrongful act of another who is also liable to an action for the same injury, the city and such other person must be joined as defendants, and

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there can be no judgment against the city unless judgment be also rendered against the other person who is also liable. But if a person be joined as defendant with the city who is found upon a trial not to be liable to an action by the plaintiff, this will not prevent a recovery against the city if the case be one in which an action could have been maintained against the city alone before the adoption of the charter.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for the city of St. Louis, appellant.

Plaintiff was not entitled to recover because, at the time he received the injury, he was using the street only as a play ground. *Stinson v. Gardiner*, 42 Me. 248; *Blodgett v. Boston*, 8 Allen 237; 2 Dillon Munic. Corp., (3 Ed.) §§ 1000, 1001, 1002. The obligation resting upon the city is filled if the streets are reasonably safe for travel—not for play or for any other purpose, but solely for travel. *Blake v. St. Louis*, 40 Mo. 569; *Smith v. St. Joseph*, 45 Mo. 449; *Bowie v. Kansas City*, 51 Mo. 454; *Barrett v. St. Joseph*, 53 Mo. 290; *Brown v. Glasgow*, 57 Mo. 156; *Craig v. Sedalia*, 63 Mo. 417.

Cline, Jamison & Day for the Vulcan Iron Works, appellant.

The jury having found the Vulcan Iron Works not guilty of negligence could not do otherwise than find for the city. Charter, art. 16, § 9.

A. R. Taylor for respondent.

The chief vice of the instructions given for the defendant, the Vulcan Iron Works, is, that they ignore entirely the capacity of the plaintiff, a child, and charges him with the same degree of care and prudence as an

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aduit. *Kempinger v. R'y Co.*, 3 Mo. App. 681; *Boland v. R. R. Co.*, 36 Mo. 484; *O'Flaherty v. R. R. Co.*, 45 Mo. 70; Wharton on Negligence, § 310; *R. R. Co. v. Gladman*, 15 Wall. 401; *R. R. Co. v. Stout*, 17 Wall. 657. The instruction given at the instance of the city, that if plaintiff was on the street at the time of the injury, for amusement or pastime, that fact bars a recovery, was error. This is New England Town Law, and is statutory and barbarous. Wharton on Negligence, § 991; *Blodgett v. Boston*, 8 Allen 257; Wharton Neg., § 957; Dillon on Munic. Corp., (2 Ed.) § 785. New England towns have been held to be affected with no common law liability as to their highways. Wharton Neg., 266. A municipal corporation having full power to remove a nuisance and neglecting to do so, is liable for injuries caused thereby. Wharton Neg., § 265; Dillon on Munic. Corp., (2 Ed.) § 798; Cooley on Torts, p. 625; *Jones v. New Haven*, 34 Conn. 1; *Norristown v. Moyer*, 67 Pa. St. 355. A city by accepting a charter empowering it to keep its streets in repair, is liable to parties injured through its negligence in keeping up repairs. Wharton Neg., § 959.

HOUGH, J.—This is an action for damages for personal injury received by the plaintiff from the falling of a bank of earth upon him in Clay street, in the city of St. Louis. The bank of earth was created by excavation and removal of sand and dirt by the Vulcan Iron Works, during a period of several years, of which the city had notice.

The plaintiff's testimony tended to show that Clay street was one of the principal streets in that quarter of the city in which it was located, that it was used for travel, and was necessary for the convenience of the public; that on the day before the plaintiff was injured, the servants of the Vulcan Iron Works dug into the bank and removed sand and dirt therefrom, and left the bank undermined and in such condition that it was thereby caused to fall; that at the time of the injury the plaintiff, being then eleven

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years of age, was on an errand for his mother, and stopped to watch some boys who were playing at the bank, and while looking on, but not participating in the play, the bank fell, killing one boy and seriously injuring the plaintiff. The testimony for the defendants tended to show that the bank was caused to fall by the act of the plaintiff and other boys, who were at play, digging into it; that the plaintiff was not at the time using the street for the purpose of travel, but as a play ground and for purposes of amusement; that the street was in its natural condition and had never been graded, improved or repaired, and could not be used for vehicles, and that plaintiff had long lived in the vicinity of the bank, knew its condition and had been in the habit of playing there. There was a verdict and judgment for both defendants.

The court of appeals reversed the judgment of the circuit court, for error committed in giving the following instruction: "If the jury believe from the evidence that plaintiff, Donoho, at the time he received the injuries complained of, was in company with other boys using Clay street for the purpose of playing or amusing themselves thereon and not for the purpose of passing over or traveling on said street, then, notwithstanding he was injured, he cannot recover against the city of St. Louis." The opinion of the court of appeals is reported in 7 Mo. App. 447, and for the reasons there given we are of opinion that its judgment should be affirmed.

We are further of opinion that the following instruction, asked by the plaintiff, should have been given: "The court instructs the jury that, in considering the question as to whether or not plaintiff contributed by his own act to cause the injury to himself mentioned in the petition, they should take into consideration his age and discretion, and if the jury find from the evidence that plaintiff was of the age of eleven years, and did not possess the discretion of an adult or grown person

1. MUNICIPAL CORPORATION: defective streets: infancy.

2. INFANCY: contributory negligence.

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at the time of the injury, then the jury should consider these facts in determining whether or not plaintiff was guilty of contributory negligence at the time of said injury that contributed to cause said injury." The instruction was a proper and necessary qualification of the following instruction which was given at the request of the defendant, the Vulcan Iron Works: "Even though the jury should find from the evidence that the employes of the Vulcan Iron Works left the bank in question in a dangerous or insecure condition, and should further find, that while in that condition, the plaintiff and his companions dug into and weakened its support, and thereby contributed to the immediate cause of its fall, the plaintiff cannot recover."

As the case is to be retried it may be well to observe, that we do not construe the 9th section of article 16 of the city charter of St. Louis, adopted in 1876, as it appears to be construed by the counsel for the plaintiff and for the defendant, the Vulcan Iron Works. We understand this section to mean, that when the city is liable to an action on account of the negligence or wrongful act of another, who is also liable to an action for the same injury, the city and such other person must be joined as defendants, and there can be no judgment against the city, unless judgment be also rendered against such other person, who is also liable. But if a person be joined as defendant with the city, who is found upon a trial not to be liable to an action by the plaintiff, this will not prevent a recovery against the city, if the case be one in which an action could have been maintained against the city alone, before the adoption of the section referred to. The purpose of this section doubtless is to prevent circuitry of action and a multiplicity of suits and their attendant evils, in those cases where the city can be held liable for the wrongful or negligent acts of others who are primarily liable, and who would in turn

3. ST. LOUIS: Ha-
bility for imputed
negligence: prop-
er parties under
the charter of 1876

The State v. Crank.

be liable over to the city. The judgment of the court of appeals will be affirmed, and the cause remanded to the circuit court for a new trial. The other judges concur.

THE STATE V. CRANK, *Appellant*.

Recent Possession of Stolen Property: PRESUMPTION OF GUILT GOOD CHARACTER. The possession of property soon after it is stolen if not explained or accounted for, is presumptive evidence of guilt, but it is not necessarily conclusive where there is evidence of good character; and an instruction is too narrow which does not submit to the jury the evidence of good character in connection with that of recent possession. See *State v. Butterfield*, ante, p. 297.

Appeal from Henry Circuit Court.—HON. JAMES B. GANTT, Judge.

REVERSED.

M. A. Fyke for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—The defendant was indicted at the regular August term, 1881, of the Henry county circuit court for larceny in stealing one steer, the property of one Calvird. He was convicted, on trial, of the offense charged, and on his appeal to this court avers that the trial court committed error in instructing the jury.

It appears from the record that Calvird, who lived in Henry county, missed the steer in question about the 26th day of April, 1881, and in July following found it with a herd of cattle in Vernon county in charge of defendant; that the cattle in said herd belonged to various persons residing in Henry county, with whom defendant had contracted to take them to Vernon county for the purpose of

being grazed. The evidence tended to show that the said cattle were driven from Henry county about the time Calvird missed his steer; that after they had been collected together and previous to starting, some of them, quite a number, got away and that the steer in question was put, without defendant's knowledge, into the herd by one of his hands, under the supposition that it was one that had escaped. There was abundant evidence of defendant's good character.

It is insisted by counsel for defendant, in view of the evidence as to the good character of defendant, that the instruction given by the court of its own motion was too narrow and restricted. The said instruction is to the effect that if the jury believed that soon after said steer was stolen, it was found in the possession of defendant, then such possession was in presumption of law guilty, "and if such possession is not satisfactorily explained by defendant, it will be conclusive evidence of his guilt, and it devolves upon defendant to explain his possession to the satisfaction of the jury." In the case of the *State v. Kelly*, 73 Mo. 608, and *State v. Sidney*, 74 Mo. 390, while it was held that such an instruction as the above was proper in a case where there was no evidence of the good character of defendant, it was also held that in a case where such evidence was introduced, such an instruction would be subject to the objection that it was too restrictive. In passing upon the question in the case of *State v. Kelly*, *supra*, it was observed: "If there really had been evidence of good character, the instruction would not have been sufficiently comprehensive, because good character would neither account for nor explain the possession of the property recently stolen, though it would certainly have a very important bearing in rebutting the presumption of guilt consequent on such possession." The same principle is announced in the case of *State v. Bruin*, 34 Mo. 541. Judgment reversed and cause remanded, in which all concur.

Franklin Ave. German Savings Inst. v. Board of Education of the Town of Roscoe.

THE FRANKLIN AVENUE GERMAN SAVINGS INSTITUTION. *Appellant*, v. THE BOARD OF EDUCATION OF THE TOWN OF ROSCOE.

1. **De Facto Board of Education :** LIABILITY ON SCHOOL BONDS. A board of education which has long acted and been recognized as a legal body, cannot avoid liability on bonds issued on behalf of its school district, by showing that the district was not legally organized.
2. **Parol Evidence to Explain Ambiguous Instrument.** Where a bond appearing on its face to be the obligation of a corporation leaves it doubtful what corporation is intended, parol evidence will be received to explain the ambiguity.
3. **Corporation: ULTRA VIRES.** The obligor in a bond in the hands of a corporation, will not be allowed to show, for the purpose of defeating recovery on the bond, that the corporation has no power to hold or sue upon it. The State alone is the proper party to institute such an inquiry.
4. **School Bonds :** STATUTORY LIMIT ON SELLING PRICE. A board of education sold its bonds at ninety cents on the dollar, the purchaser charging and retaining out of the proceeds one per cent as a commission on the sale. A statute prohibited the bonds being sold at less than ninety cents on the dollar. *Held*, that this transaction was no violation of the statute.

Appeal from St. Clair Circuit Court.—HON. J. D. PARKINSON, Judge.

REVERSED.

The plaintiff was a corporation organized under chapter 68, General Statutes 1865, "Of Savings Banks and Fund Companies." This action was brought against the Board of Education of the Town of Roscoe on several bonds and coupons. The bonds were in the following form :

It is hereby certified that the Special School District of the Town of Roscoe, county of St. Clair and State of Missouri, is indebted to ——— or bearer, in the sum of \$500, payable * * . This bond is issued under

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and by virtue of an act of the legislature of Missouri, entitled "An act to authorize cities, towns and villages to organize for schools, with special privileges," and approved March 21st, 1870.

[SEAL.]

JAS. ISAMINGER, President.

HENRY S. SWAN, Secretary.

At the trial it appeared in evidence that no election was ever held in the district for the adoption of the school law; but that in 1870, prior to the issue of the bonds, a board of directors was elected and qualified, and their successors had been regularly elected and had acted as directors of the special district of the town of Roscoe, by filing estimates, receiving and paying money from taxes assessed and apportionment of public funds and estimates annually returned by defendant, and had been generally recognized as the board of education of the independent school district of Roscoe; that the county officers had recognized defendant as a special school district from the election of the board of education to the institution of this suit; that one Gardner sold the bonds in question to plaintiff, and defendant received for said bonds eighty-nine cents on the dollar; that plaintiff agreed to pay ninety cents on the dollar, but deducted a commission of one cent on the dollar for buying the same; that the school in the district was generally patronized by the residents of the district, and that levies were regularly made for the payment of interest accruing on the bonds; that said interest was collected by defendant and paid over to plaintiff up to the time the last interest coupons fell due on said bonds, and that said coupons, representing the interest so levied, collected and paid, were received by defendant in settlement with the treasurer.

The plaintiff also offered in evidence copies of orders drawn by defendant in the usual way, by the proper officer of an independent district, on the proper officer, directing the payment of money for teachers' wages; also of estimates of money needed for all proper purposes of such

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district, including the payment of interest on these bonds, and enumerations of tax-payers in the district, showing that in those matters defendant acted as an independent district ever since before the issue of the bonds; also reports and returns of elections, showing that during all that time said defendant district had held regular elections for directors as an independent district, and made returns of the same, which were duly recognized and canvassed by the county clerk and two justices of the peace, and certified, and the organization thus kept up; that the existence of defendant as such independent district was all that time recognized by the county clerk, collector, treasurer and all county officers; that their estimates for taxes were duly entered on the tax-books, and taxes duly collected by the collector and paid over to the treasurer of defendant, on his receipt; that the public money from interest on State and county fund, was duly apportioned to defendant all that time, as an independent district, and paid to it on the receipt of its treasurer; that in all things, defendant, ever since 1870, had acted as an independent district under the act aforesaid, and called itself such, and was so recognized by all officers and parties, and was, when suit was brought and tried, acting under the same organization, and no other that existed prior to the issue of the bonds; that the signatures of those who signed the bonds were the proper signatures of those who were acting as president and secretary of defendant then, and that defendant then had a corporate seal which was placed and impressed on the bonds; that the treasurer of defendant duly and at proper times made settlement of accounts with the county clerk, exhibiting his vouchers and filing them, including coupons from these bonds. This evidence was excluded.

Among other instructions given by the court was the following for the defendant:

Plaintiff has no legal capacity under the evidence and its act of incorporation, to recover judgment on the bonds and coupons sued on in this cause.

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Smith & Shirk for appellant.

Johnson & Lucas for respondent.

I.

SHERWOOD, C. J.—It is quite immaterial, so far as the present action is concerned, what irregularities may have characterized the organization of “the Special School District for the Town of Roscoe.” In 1870, prior to the issuance of the bonds in suit, a board of directors was elected, qualified and entered upon the discharge of their duties, and since that time their successors have been regularly elected and acted in that official capacity, and been generally recognized as the “Board of Education of the Independent School District of the Town of Roscoe;” and the county court have so recognized them. This being true, such board must be regarded as one *de facto*, whose right to act none but the State is competent to question.

II.

No difficulty is experienced as to the liability of the defendant board on the bonds in suit, so far at least as concerns the form in which those bonds are signed. No principle is more firmly established than that the acts of officers and agents, as respects commercial paper and the like, do not derive their validity from professing on their face to have been done in the exercise of delegated authority. The books abound with instances affirmative of this position; (*Washington Mutual Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480, and cases cited; *Ferris v. Thaw*, 72 Mo. 446, and cases cited;) the liability of the principal in such cases, depending on the act done and not on the form in which such act finds expression. By section 12 of the law to which the writings obligatory make reference, the board of education was empowered to issue bonds, and if there was any ambiguity as to who was intended to be bound, parol evidence, such as was offered in the court.

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below, was competent to supply any lack in this particular. See above authorities. And if there was any difference between the instrument declared on and that offered in evidence, advantage should have been taken of the variance as the law provides *Ferris v. Thaw, supra*.

III.

The court below seems to have thought, as appears by the first instruction given on the part of the defendant, that plaintiff did not possess the legal capacity to purchase and maintain suit upon the bonds. On this point it is enough to say that the State alone is the proper party to institute such an inquiry. *Thornton v. National Exchange Bank*, 71 Mo. 221, and cases cited.

IV.

Section 12 of the act under which the bonds in suit were issued, prohibits such bonds from being "Sold or disposed of at less than ninety cents on the dollar." We need not, however, discuss this prohibitory feature of the act, for the reason that there has been no violation thereof, because the bonds were not sold for less than the specified sum. It is true that plaintiff deducted one per cent for selling the same. This was not allowable; the plaintiff could not fill the double capacity of both buyer and seller. But certainly an illegal demand for a commission which was not earned, and, therefore, should not have been charged and deducted, cannot be permitted to avoid and render null a legitimate transfer of these bonds. For these reasons judgment reversed and cause remanded. All concur.

Chrisman v. Hodges.

CHRISMAN V. HODGES *e. al.*, Appellants.

Contracts: PAROL EVIDENCE. A contract in writing which is complete and perfect in itself and not ambiguous in its terms, will be held to supersede a prior written contract in relation to the same subject matter; and parol evidence will not be admitted to show that such was not the intention of the parties.

Appeal from Clay Circuit Court.—HON. GEO. W. DUNN,
Judge.

AFFIRMED.

Job South, Simrall & Sandusky for appellants, cited *Huth v. Carondelet Marine R'y Co.*, 56 Mo. 203; *Olney v. Eaton*, 66 Mo. 563.

Jas. E. Lincoln for respondent, cited *Koehring v. Mumminghoff*, 61 Mo. 407; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; *Griswold v. Seligman*, 72 Mo. 111; *Pearson v. Carson*, 69 Mo. 550; *Henshaw v. Dutton*, 59 Mo. 139.

HOUGH, J.—This was a suit to recover a balance due on the following instrument:

LIBERTY, Mo., February 6th, 1878.

On the 1st day of March next, we, or either of us, promise to pay Virginia Swinney, or order, for value received, \$4,538, with ten per cent interest from due, compounded if not paid annually. This note is given for the balance of the purchase money due on a farm this day purchased by us from Virginia Swinney; and it is hereby agreed that this note shall not bear any interest if the said contract fails to be completed by the fault of said Virginia Swinney at the time mentioned in the title bond this day to be delivered by her.

Z. T. HODGES,
H. H. HODGES.
FRANK HODGES.

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On July 24th, 1878, this instrument was assigned to the plaintiff. It appears from the record that on the 18th day of December, 1877, the defendants made a contract with one William Swinney, for the purchase of the land referred to in the instrument sued on, which contained the following stipulation :

“ When said Swinney makes said parties a good and sufficient deed to said land, the said parties of the second part agree to pay of said \$5,500 the sum of \$1,000 ; and when said Swinney gives possession of said premises to said parties of the second part, they agree to pay said Swinney the balance of said sum, to-wit : the sum of \$4,500. As a part of this last payment said Swinney agrees to take a note, secured by deed of trust on John Hodges' land, for about \$500, being the same note said parties of the second part got from the Missouri City Savings Bank.”

At the time this contract was entered into, there was a suit for divorce pending between Sallie Swinney and said William Swinney, her husband, and also a suit for partition of the land sold, the land being incumbered at the time by a deed executed March 1st, 1876, by William Swinney to John Chrisman, as trustee, which conveyed an undivided half thereof to said trustee for the sole and separate use of said Sallie Swinney during her life, and at her death to be conveyed to the children of said Sallie Swinney, and the children of said William Swinney then living. The suits in partition and divorce were compromised and settled, and Mrs. Swinney, for the sum of \$1,000, agreed to convey to William Swinney all her interest in the land secured to her for life. This conveyance was, for convenience and at the instance of William Swinney, made to his daughter, Virginia Swinney. All other parties having any interest under said trust deed also conveyed their interests to Virginia Swinney, who having been thus invested with the entire title, executed on the 6th day of February, 1878, a bond for title to the defendants, containing the following condition :

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"The condition of the foregoing obligation is such, that, whereas, the said Virginia Swinney has this day sold to the said Zachariah T. Hodges, Henry H. Hodges and Frank Hodges, for and in consideration of the amounts hereinafter specified, the following described real estate, (describing it). The said Zachariah T., Henry H. and Frank Hodges have this day paid in cash to the said Virginia Swinney the sum of \$1,000, the receipt of which is hereby acknowledged, on said land, and executed their joint promissory note of even date herewith, for the sum of \$4,538, due on the 1st day of March, 1878, with interest from due at the rate of ten per cent per annum, compounded at end of each year if not paid when due; and the said Zachariah T., Henry H. and Frank Hodges further binding themselves to pay, in addition to said note to Virginia Swinney, the value of the wheat and the labor for putting the same in, that is now sowed on said farm."

The note sued on was executed by defendants at the same time. At the instance of the defendants who executed the note, William Swinney and Virginia Swinney were made parties defendant.

The makers of the note claim the right to show by parol testimony, that it was not the intention of the parties, by the execution of the note and title bond, to alter the terms of the original contract of December 18th, 1877, between themselves and William Swinney, or to substitute a new contract therefor, and that the plaintiff should be required to receive the Hodges note in part payment of the note sued on, as provided in the original contract. We do not think such testimony was admissible. Its effect would be to contradict the terms both of the title bond of Virginia Swinney and the note executed by defendant, now sued on. The note promises to pay in money, and the evidence offered, was for the purpose of showing that said note was to be partly paid in property. The note is complete and perfect in itself, the terms are unambiguous, and being the latest expression of the agreement of the parties,

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it must be held to supersede the original contract of December 18th, 1877, and not subject to be varied by parol.

The judgment of the circuit court properly construed, is a money judgment only against the makers of the note, and not against William Swinney and Virginia Swinney as contended by defendants' counsel. This sufficiently appears from the closing sentence of the decree, which is as follows: "And it is further decreed that upon the payment of said sum of \$719.27 by said Z. T. Hodges, Henry Hodges and Frank Hodges, the title and all the interest of Virginia Swinney, William Swinney and John Chrisman be vested in said Z. T. Hodges, Henry Hodges and Frank Hodges." The judgment of the circuit court will be affirmed. The other judges concur.

THE STATE V. HICKMAN, *Appellant*.

1. **Criminal Law: ABSENT WITNESS: CONTINUANCE.** The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, (R. S. 1879, § 1886,) can only be invoked by the State after the accused, by exercising reasonable diligence, shall have unsuccessfully employed the power of the court to secure the personal presence of such of his witnesses as may be within the reach of its process. It does not apply to a case where a subpoena has been seasonably issued, but for want of time has not been returned. See *The State v. Underwood*, ante, p. 230.
2. — : — : **IMPEACHING EVIDENCE.** In a criminal case, when the prosecution, in order to avoid a continuance, has admitted that an absent witness if present would give testimony as stated in defendant's application for a continuance, evidence will not be received, by way of impeaching such testimony, that the witness has made a contradictory statement.
3. — : — : **EVIDENCE: STATEMENT OF CONFEDERATE.** Statements made by one jointly indicted with the defendant, long after the commis-

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sion of the alleged offense, and not in the presence of the defendant, are not admissible against him.

Appeal from Bates Circuit Court.—HON. JAMES B. GANTT, Judge.

REVERSED.

Parkinson & Abernathy for appellant.

The action of the court below in overruling the two motions for continuance, (*vide* Rec. pp. 13 and 17,) and compelling appellant to trial on the day after arraignment and before a reasonable time had elapsed for the return of process for certain witnesses within the jurisdiction of the court, is a literal application of the statute of continuances (§ 1886), but is subversive of the guaranty contained in section 22 of article 2 of the constitution of Missouri, and is or may become as administered and applied in this case a violation of article 3. *Goodman v. State*, Meigs (Tenn.) 195; *Dominger v. State*, 7 Sm. & M. 475; 2 Story's Const., (2 Ed.) §§ 1792, 1794; *People v. Diaz*, 6 Cal. 248; *Hyde v. State*, 16 Texas 445; *Van Meter v. People*, 60 Ill. 168; *Att'y Gen. v. Eau Claire*, 37 Wis. 400; *McCabe v. Mazzuchelli*, 13 Wis. 478; *Wassels v. State*, 26 Ind. 30. The interpretation given of the act of 1875 in *State v. Miller*, 67 Mo. 604, and followed in *State v. Hatfield*, 72 Mo. 518, and doubly followed in *State v. Underwood*, *ante*, p. 230, is an interpretation of an affirmative statute—a statute too, that may well be regarded as simply declaratory of a general power inherent in all trial courts. But section 1886 is a statute couched in negative phrase. Potter's Dwarrris, pp. 70, 71, 79. If it be granted, however, that section 1886 although a negative statute is (under Cokes exceptions, Potter Dwarrris See., pp. 71, 72,) simply declaratory of a judicial power always existing in trial courts on matters of continuance, it may and should be so construed as to be

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made effective within constitutional limits and the settled course of criminal courts, and void only so far as any of its provisions or its administration contravenes the constitutional rights of a defendant; (*State v. Clark*, 54 Mo. 17; *Neenan v. Smith*, 50 Mo. 525; *Connor v. Chic., R. I. & Pac. R. R. Co.*, 59 Mo. 285; *State v. Diving*, 66 Mo. 375;) and so construing it, the action of the court below is reviewable, and the facts show that the continuance should have been granted. *State v. Wood*, 68 Mo. 444.

D. H. McIntyre Attorney General, for the State.

HOUGH, J.—Pending a preliminary examination before a justice of the peace in Bates county, for the crime of grand larceny, the defendant was, on the 18th day of March, 1882, indicted in the Bates circuit court for the same offense with which he was charged before the justice. On the 27th day of March, 1882, he was arraigned and pleaded not guilty. On the day following, his case was called for trial, whereupon he made an application for a continuance on the ground of the absence, among others, of several witnesses, who resided in Miller county, for whom subpoenas had been issued and mailed to the sheriff of said county on the 23rd day of March, 1882, but which had not been returned, sufficient time not having elapsed for their service and return. The prosecuting attorney admitted that the absent witnesses would if present testify to the facts which the defendant in his application for a continuance stated he expected to be able to prove by them, and the application for a continuance was thereupon overruled, and the defendant was forced to go to trial, and was convicted and sentenced to three years' imprisonment in the penitentiary. The statement in the affidavit of what the absent witnesses would swear to if present, was read at the trial on behalf of the defendant. The State was permitted to prove, against the objection of the defendant, that one of defendant's absent witnesses had made state-

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ments in contradiction of the facts which the prosecuting attorney had admitted said absent witness would swear to if present. The circuit court also permitted the State to introduce evidence of the declarations of one Reed, who was jointly indicted with defendant, made in the absence of defendant and long after the date of the alleged larceny.

Process for the defendant's witnesses having been seasonably issued, we think the circuit court erred in compelling him to go to trial before the same
1. CRIMINAL LAW: absent witness: continuance. was returned, there being nothing in the application for a continuance, or in the record before us, indicating that the subpoenas had not been issued in good faith or that the same could not be served. Section 22, article 11 of the constitution, provides that in all criminal prosecutions the accused "shall have process to compel the attendance of witnesses in his behalf," and in pursuance of this provision it has been enacted by the legislature that "every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf." R. S. 1879, § 1848. Section 1886, Revised Statutes, which provides that when the prosecuting attorney will consent that on the trial the facts set out in the affidavit, which the party asking for continuance expects to prove by the absent witness, shall be taken as and for the testimony of such witness, the trial shall not be postponed on account of the absence of such witness, was never intended to deprive the accused of his constitutional and statutory right to have compulsory process for his witnesses. This section can only be invoked by the State after the accused, by exercising reasonable diligence, shall have unsuccessfully employed the power of the court to secure the personal presence of such of his witnesses as may be within the reach of its process. He is entitled to a reasonable time to have a subpoena which has been seasonably issued, served and returned, and if the witness be found and fail to attend, he is entitled to an attachment to compel his attendance; if the attachment prove unavailing

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and the defendant thereupon applies for a continuance, the State may then prevent a further delay in the trial by consenting that the facts which the absent witness is expected to prove, and which are set out in said application shall be taken and received by the court or jury trying the cause as the testimony of such absent witness. *State v. Roark*, 23 Kas. 147.

That we have given this section its true scope and proper application is quite manifest when we consider that it was obviously intended to prevent a continuance of the cause, which but for this section, it would be the duty of the court to grant. If the defendant failed to show in his application for a continuance a reasonable and proper degree of diligence by the use of the process of the court and otherwise, to procure the attendance of his witnesses, he would be compelled to go to trial notwithstanding their absence and without any admission on the part of the State as to what they would swear if present. It is only where a good ground for a continuance has been shown that the admission provided for in this section can be made and the trial proceed without the consent of defendant. *State v. O'Connor*, 65 Mo. 374. And a good ground for a continuance on account of the absence of witnesses, who are within reach of the process of the court can only be shown when the process of the court has been unavailingly employed to compel their attendance, or when it is perfectly manifest to the court that such process, if issued, would be unavailing. *State v. Hatfield*, 72 Mo. 518.

The court erred in permitting the State to prove the statements of the absent witness in contradiction of the
 2. ———: ———: facts which it was admitted such absent witness would swear to if present. The statute
impeaching evidence.
 in relation to continuances in civil cases provides that when one party admits that an absent witness would, if present, swear to the facts set out in the affidavit for a continuance, he may disprove such facts, "or prove any contradictory statement made by such absent witness in relation to the

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matter in issue and on trial." R. S., § 3596. But there is a very marked difference between the phraseology of this section and that of the corresponding provision relating to criminal cases found in section 1886, and applicable to the case at bar. This section provides that the facts which it is admitted the absent witness would swear to, if present, "may be contradicted by other evidence, and the general reputation of such witness may be impeached as in the case of other witnesses who testify orally or by deposition." What "other evidence" is here meant? Plainly, other competent evidence, and evidence of contradictory statements is only admissible when a proper foundation has been laid for its introduction. No such foundation was or could be laid, in the case before us, and the contradictory statements of the absent witness should not, therefore, have been admitted in evidence.

The circuit court also erred in admitting the declarations of Reed, heretofore referred to. They had no material bearing upon the question of the guilt or innocence of the defendant, and even if relevant they were made long after the time when the alleged larceny was committed, and in the absence of the appellant. *State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 262.

For the foregoing reasons the judgment of the circuit court will be reversed and the cause remanded. NORTON, J., absent; HENRY and RAY, JJ., concur; SHERWOOD, C. J., concurs in the result.

Rembaugh v. Phipps.

REмбаUGH V. PHIPPS, *Appellant*.

1. **Conversion.** One who innocently obtains the property of another from a third party, may when informed of the right of the true owner, lawfully return it to the person from whom he obtained it, provided he does this before demand made or suit brought; but if he asserts any title in himself, or if he returns it after demand made, he will be guilty of conversion.
2. ———: **VERDICT.** The verdict in an action for conversion was: "We, the jury, find a judgment for plaintiff for the sum of \$90." *Held*, informal, but sufficient in substance.

Appeal from Pettis Circuit Court.—HON. WILLIAM T. WOOD,
Judge.

AFFIRMED.

E. J. Smith for appellant.

Snoddy & Short for respondent.

HENRY, J.—This is an action for the value of a spring wagon which plaintiffs allege defendant converted to his own use.

Plaintiff Rembaugh testified to his ownership and that he took it to a shop in Sedalia for repairs, and went to Colorado, leaving the wagon at the shop; was gone about three months, and when he returned, Wells, the mechanic with whom he left it, had left the county, and he could not find the wagon; that about a month after, he saw defendant driving it and using it as a delivery wagon for his grocery store; that he told defendant it was his wagon, and defendant said he had traded for it; they then parted, and within an hour plaintiff went to defendant's store and defendant told him he had taken the wagon back to the man he got it from; about three days after he again saw defendant, who told him he got the wagon of Frank Sprague, who had taken it back; witness went to Sprague's stable and found the tongue but not the wagon. Tetue

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testified that defendant told him he got the wagon of Sprague.

Defendant testified that his delivery wagon was broken, and that he arranged with Sprague to use the wagon in controversy a week, and, if it suited, would trade for it; drove it himself, and the first trip he made with it Rembaugh claimed it; witness went to the store, left the wagon, and told Sprague what Rembaugh said, and told Sprague to get the wagon, which he did; that defendant did not have it in his possession exceeding four hours. He contradicted Rembaugh, but it is sufficient to say, that there was a conflict of testimony, with respect to the value of, and length of time defendant had possession of, the wagon.

For plaintiffs the court instructed the jury: "If the jury believe from the evidence that plaintiffs were the owners of the wagon in controversy, and that plaintiffs had left the same with Wells, for the purpose of having it repaired, and that afterward plaintiffs, or either of them, in search of said wagon, found it in possession of defendant, and when plaintiffs, or either of them, claimed and demanded said wagon, as owners, from defendant, he, then being in possession thereof, claimed he traded for said wagon, or retained possession thereof in opposition to the claim of plaintiffs, then he was guilty of a conversion of the same, and is liable to plaintiffs for the full value of the wagon."

For defendant the court instructed the jury that the burden was on plaintiffs to prove ownership and conversion of the wagon; also, as follows: "Although the jury may believe the wagon in question was the property of plaintiffs, yet if they believe the only connection defendant had with it was to get it from Sprague to use, and try and see whether it would suit him, with a view to trading for it, and when he found that plaintiff claimed it he returned it to Sprague, and did not have anything more to do with it, then the jury will find for defendant."

Of his own motion, the court gave this: "That if

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the jury believe the wagon in controversy was and is the property of plaintiffs, and further believe that at the time this suit was brought, or shortly before, defendant had obtained and had possession of the same, and appropriated and converted said wagon to his own use, the jury will find for plaintiffs, and assess the damage at the value of the wagon. But if the jury believe from the evidence that about the time or shortly before the bringing of this suit, defendant had borrowed said wagon from witness Sprague, having no knowledge of plaintiffs' right in or claim to said wagon, and only had possession of it three or four hours, and while so in possession, being informed by plaintiff that the wagon was his, he immediately returned the wagon to Sprague, and further believe that he so returned it before suit was brought or demand made by plaintiff, they will find for defendant."

The jury returned this verdict: "We, the jury, find a judgment for plaintiff for the sum of \$90."

The instructions correctly declared the law applicable to the case.

Appellant contends that the verdict is not responsive to the issues. The suit was for damages for the conversion of the wagon. The verdict is informal, but it clearly enough appears that it is a verdict in favor of plaintiffs for \$90 damages. All concurring, the judgment is affirmed.

THE STATE *ex rel.* MALLINCKRODT V. McGRATH, *Secretary of State.*

1. **Corporation:** CORPORATE NAME. A family name not conjoined with a christian name is not "the name of a person" within the meaning of the statute which makes the word "company" or "corporation" an essential part of the name of every corporation assuming the name of a person or firm. R. S. 1879, § 762. Hence, the

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name "*Mallinckrodt Chemical Works*" does not come within the statutory requirement.

2. —. The object of the statute is to prevent corporations from conducting business in the names of firms and individuals, thereby misleading the public into the belief that they are dealing with individuals and are entitled to the protection offered by their personal liability.

Mandamus.

PEREMPTORY WRIT AWARDED.

Marshall & Barclay for relators, cited *Zimmerman v. Erhard*, 83 N. Y. 74; s. c., 38 Am. Rep. 396.

M. K. McGrath pro se.

HOUGH, J.—This is an application for a writ of mandamus to compel the Secretary of State to issue a certificate of incorporation to an association of persons who have assumed the name of "*Mallinckrodt Chemical Works*." The Secretary of State submits the case upon the facts stated in the petition of the relator, and thereby concedes that the articles of association are in proper form, and duly acknowledged; that the incorporation tax has been paid into the State treasury, and that he declines to issue a certificate of incorporation solely for the reason that the name assumed does not conform to the requirements of section 762 of the Revised Statutes. The material portions of that section are as follows: "No certificate of its incorporation * * shall be issued by the Secretary of State to any company or association * * where the corporate name and style assumed is the name of a person or a firm, unless there be joined thereto some word designating the business to be carried on, followed by the word "company" or "corporation."

We are of opinion that the corporate name "*Mallinckrodt Chemical Works*" does not come within the inhibition of the foregoing section. It contains neither the

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name of a person nor the name of a firm. The law supposes every person to be designated by two names, one a family name, and the other the name given to him at his baptism, and denominated his christian name. *Frank v. Levi*, 5 Robt. 599; Bac. Abr., vol. 7, p. 7. The family name is that portion of the name of an individual which is employed by him in common with other members of his family, and, therefore, fails to designate any particular individual. "Mallinckrodt" is a family name, and not the name of "a person" or individual, and need not, therefore, be followed by the word "company" or "corporation."

The object of the statute in question, undoubtedly was to prevent corporations from conducting business in firm names and in the names of individuals, thereby misleading the public into the belief that they are dealing with individuals, and are entitled to the protection afforded by their personal liability. The name assumed in the case before us, contravenes neither the letter nor the spirit of the statute. The peremptory writ will be awarded. The other judges concur, except NORTON, J., who is absent.

BOWEN V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
Appellant.

1. **Railroad**: DOUBLE DAMAGES FOR KILLING STOCK: PLEADING. It is not essential to the sufficiency of the statement in an action against a railroad company to recover double damages for the killing of cattle, that it contain an express averment that the injury was occasioned by the failure of the company to erect and maintain fences as required by the statute. Any averment from which this may be inferred will be sufficient.
2. **Instructions** are properly refused, however correctly they may declare the law, when there is no evidence tending to prove the facts upon which they are predicated.

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Appeal from Clinton Circuit Court.—HON. GEORGE W. DUNN,
Judge.

AFFIRMED

G. W. Easley for appellant.

HENRY, J.—This action was commenced before a justice of the peace, to recover double damages, under the statute, for a steer killed by a train of defendant's cars. The statement filed with the justice, alleged that: "The killing of the above described animal was done in the county of Clinton, Lafayette township, and State of Missouri; that the said defendant's fence was down, and in such condition as to allow animals to come and go inside of the inclosure at pleasure, contrary to the statutes of the State of Missouri, and by reason of such negligence of the defendant, and without any fault of the plaintiff, the said engine did strike and kill the plaintiff's steer, for which said plaintiff claims double damages, to the amount of \$36, according to the statutes of the State of Missouri." Plaintiff had a judgment in the justice's court, from which defendant appealed to the circuit court of Clinton county, where plaintiff again had judgment, and from that judgment defendant has appealed to this court, and contends that the statement did not allege, nor the evidence show, that the injury was occasioned by the failure of the company to erect and maintain fences.

In the case of *Edwards v. K. C., St. Jo. & C. B. R. R. Co.*, 74 Mo. 117, the court observed: "There is no express allegation that the cow got upon the track in consequence of the failure of the defendant to erect and maintain fences and cattle-guards, as required by the statute, but we think the averment quoted, if not equivalent to such an allegation, will at least warrant an inference, that the cow got upon the track by reason of the failure to fence." The

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allegation in the statement in that case was that: "Said cow did, without the fault of plaintiff, stray upon the track of said railroad at a point on the same where it, the said railroad, ran through and along cultivated lands, and where said road was not sufficiently or lawfully fenced or guarded by cattle-guards, and where there was no public crossing on said road." That statement was held sufficient, and adhering to that decision, we hold the statement in this case sufficient.

The following instruction was asked by defendant and refused by the court: "Although the jury may believe
2. INSTRUCTIONS. from the evidence that the animal sued for was struck by the cars or engine of the defendant, inside of the defendant's fence, and that defendant's fence was in some places not a good substantial fence, four and a half feet high; yet, if they further believe that, at the point where said animal got upon the railroad inclosure, the defendant's fence was a good substantial fence, four and a half feet high, they will find for the defendant." This instruction correctly declared the law, but there was no evidence to warrant the court in giving it, in this case. The evidence is not preserved. All that appears in the bill of exceptions is that: "The plaintiff, to sustain the issues on his part, introduced evidence tending to show that the said animal sued for was killed, at a point on defendant's railroad, where it passed through uninclosed prairie lands, on one side, and an inclosed field on the other, and not at a crossing of a public highway, and that the railroad at said point was not inclosed by a lawful fence." The defendant to sustain the issues on its part, introduced evidence tending to prove "that said animal was killed at the crossing of a public highway." It will be observed that there was no evidence introduced tending to prove the facts upon which the refused instruction was predicated. All concurring, the judgment is affirmed.

Willingham v. Hardin.

WILLINGHAM, *Appellant*, v. HARDIN.

Quit-claim Deed: RECORDING ACTS. A quit-claim deed received in good faith for a valuable consideration, without notice of a prior unrecorded deed, will prevail over such prior deed. Following *Fox v. Hall*, 74 Mo. 315, also *Boogher v. Neece*, ante, p. 383.

Appeal from Audrain Circuit Court.—HON. G. PORTER,
Judge.

AFFIRMED.

The following is the instruction referred to in the opinion: "The record of the deed from Robert C. Mansfield to J. P. Clark, given in evidence by defendant as part of his chain of title, being a quit-claim deed, defendant was bound to take notice of any defect in the title he was getting, and he only took such title as Mansfield had at the time. Although no record appears of a deed from Smith and Mansfield to John Willingham, the fact of no deed being of record is not a defense to this action."

Hall & McIntyre for appellant.

Macfarlane & Trimble for respondent.

SHERWOOD, C. J.—Among the questions this record presents, there is one which decisively dominates this case, thus obviating all necessity for considering any other. The defendant exhibited in evidence a perfect paper title. Among the links in his chain of title, however, were several quit-claim deeds. The theory of an instruction asked by the plaintiffs but refused by the court was to the effect that defendant, in consequence of the foregoing facts, did not occupy a position such as he would have occupied had the deeds mentioned been other than quit-claim deeds. This theory was erroneous, as was expressly decided by this court in *Fox v. Hall*, 74 Mo. 315, where it was held that a purchaser in good faith, for a valuable considera-

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tion, who acquires title by quit-claim deed, takes precedence of one holding under a prior unrecorded deed of which he had no notice. To the same effect see other authorities cited in 25 Alb. L. J. 123. The defendant occupies just this attitude. This being so, it would avail the plaintiffs nothing were every other point they have raised decided in their favor. Therefore, judgment affirmed. All concur.

BERRY V. THE UNION TRUST COMPANY, *Plaintiff in Error.*

Justice's Courts: APPEAL. The rule, that when an appeal is taken from a justice of the peace after the judgment day, the case will not be triable at the return term of the appellate court, unless the appellant gives notice of the appeal ten days at least before that term, or the appellee enters his appearance on or before the second day of the term, "it may be conceded, is waived or dispensed with, by the fact, that the appellant gives, and the appellee accepts notice, in writing, to take depositions, and the depositions are accordingly taken—both parties being present—and afterwards filed in the cause, before the return term; and by the further fact that the appellee, on the third day of the return term, took out subpoenas for witnesses; so far, at least, as to make the case triable, at the return term; but such facts, do not authorize an *affirmance* of the justice's judgment, at the return term, as for a *failure* to prosecute the appeal."

Error to Vernon Circuit Court.—HON. J. D. PARKINSON, Judge.

REVERSED.

Jno. Montgomery, Jr., for plaintiff in error, cited *Gluch v. Diebold*, 1 Mo. App. 265; *Pearson v. Lovejoy*, 35 How. Pr. 195; 3 Mo. 122; 50 Mo. 404.

Scott & Stone for defendant in error, cited *McCabe v. Lecompte*, 15 Mo. 78; *Henderson v. Henderson*, 55 Mo. 545.

RAY, J.—It appears from the record that this suit was originally commenced before a justice of the peace in Ver-

non county; that on the return day, the defendant not appearing, judgment by default was rendered against it; that within ten days thereafter the defendant filed its motion for a new trial, which was by the court overruled; that afterward said cause was duly appealed to the circuit court of that county, but that said appeal was taken or allowed on a day subsequent to the rendition of the judgment; that no notice of said appeal was given by appellant, and no entry of appearance in said cause was made by appellees, as required by law on or before the second day of the return term of said appeal. It also appears that after the transcript was filed with the clerk of the circuit court, the defendant gave notice to plaintiffs that it would take depositions in said cause at a time and place specified; and that plaintiffs waived the formal service of said notice by accepting service thereof in writing; that said depositions were taken accordingly; that plaintiffs appeared and cross-examined the witnesses, and that said depositions, so taken, were duly filed with the clerk of said circuit court before the commencement of the return term of said appeal. It further appears that plaintiffs, on the third day of said term, ordered and had issued and served a subpoena for witnesses in said cause. Afterward, to-wit: on the 19th day of said term plaintiffs filed in said cause the following motion, to-wit: "Now come plaintiffs and move the court to affirm the judgment of the justice, for the reason that defendant fails and refuses to prosecute its appeal in this court;" which motion was sustained by the court, and judgment was rendered thereon. Afterward, on the same day, the defendant appearing solely for this motion, filed its motion to set aside said judgment of affirmance, for the following among other reasons, to-wit: Because the same was improvidently and improperly rendered—said cause not being triable at that term; Because said appeal not having been taken on the day of the rendition of the judgment, and no notice thereof having been given the appellees, and no appearance of

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said appellees having been entered, in said cause, on or before the second day of said term, said affirmance of said judgment was premature, illegal and improper; and because it is shown, by affidavit, that said defendant has a good and meritorious defense to said action." But the court overruled this motion; whereupon the defendant duly excepted, and has brought the case here by writ of error.

The controlling question presented by this record is the propriety of the ruling of the circuit court in its judgment sustaining said motion for the affirmance of said judgment. This ruling involves the construction of section 22, 2 Wagner's Statutes, 850, being section 3056 of the Revision of 1879, which provides: "If the appellant fail to give notice of his appeal, when such notice is required, the cause shall, at the option of the appellee, be tried at the first term, if he shall enter his appearance on or before the second day thereof; or, at his instance, shall be continued, as a matter of course, until the succeeding term, at the cost of the appellant, but no appeal shall be dismissed for want of such notice." By section 21 same statute it is provided that when the appeal is not allowed on the same day when the judgment is rendered, notice is required to be served on the appellee ten days before the term at which the cause is to be determined, and by the 20th section of the same act "all appeals allowed ten days before the first day of the term of the appellate court, next after appeal allowed, shall be determined at such term, unless continued for cause."

This precise question has been decided by this court adversely to the above ruling of the circuit court in this case. In *Nay v. Hann. & St. Jo. R. R. Co.*, 51 Mo. 575, the court, after quoting and referring to the above sections, proceeds to remark: "From these provisions of the statute it is apparent that the appellee can only demand a trial at the first term, when he shall have entered his appearance on or before the second day of the term. If he fails to enter his appearance as indicated, the case cannot be tried

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at that term, unless by consent of both parties. It will stand continued, as a matter of law, till the next term. *

* But a judgment of affirmance for want of prosecution cannot be taken at the return term of said appeal." In the case of *Blake v. Downey*, 51 Mo. 437, where judgment by default was rendered at the return term, the same doctrine is affirmed, and the court say: "The appeal not having been taken on the day the judgment of the justice was rendered, and no notice thereof having been given, the cause was not properly for trial." And it may be added, that, even if the appellees had duly entered their appearance at the return term as required by statute, the most they could have done was to demand and have the cause tried at the first term; or at their instance, continued as a matter of course, until the succeeding term, at the cost of the appellant. This, the appellees in this case did not ask; but instead thereof, demanded and obtained an affirmance of the judgment of the justice. This they clearly had no right to have. It was error, therefore, in the circuit court to sustain said motion; and its said judgment of affirmance should have been set aside on the motion of defendant for that purpose.

The fact that the defendant, after the transcript of the justice in said cause was filed with the clerk of the circuit court, caused notice of the taking of depositions to be served on the plaintiffs; and the fact that plaintiffs waived the formal service of the notice by accepting service thereof, in writing; and the fact that said depositions were taken, and that plaintiffs appeared and cross-examined the witnesses, and that said depositions were filed with the clerk of said circuit court before the return day of said appeal, it may be conceded, may so alter the case as to make the cause triable upon its merits at the first term; but, still, that would not authorize an affirmance of the judgment of the justice at that term, on the ground of a failure to prosecute said appeal.

The views herein expressed are not in conflict with

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Page v. A. & P. R. R. Co., 61 Mo. 78. There it appeared that no notice of the appeal was given till after the second term of court; and that at the third term the plaintiff moved for and obtained an affirmance of the judgment of the justice. It also appeared that at all three terms of said court, the plaintiff subpoenaed witnesses, in order to get ready for trial; but that the case, owing to the state of the docket, was never reached for trial, at any time prior to the affirmance. It was there held that unless there be a voluntary appearance in the cause, notice is indispensably necessary; but that a party, if he chooses, may voluntarily appear in court, and he will then be subject to the same jurisdiction as if he had been brought in by notice or regular process; and that any act of his that, from its nature, implies that he is in court for general purposes—as to plead to the merits, or contest the trial, will be sufficient. It was, therefore, held that the plaintiff, by his conduct in the premises, had made such an appearance in court as subjected him to its jurisdiction, and that the court thereby acquired jurisdiction to proceed to try the whole case; and it was, therefore, error simply to affirm the judgment of the justice for a failure to prosecute said appeal, instead of proceeding to try the whole case upon its merits as it should have done. So, in this case, if it be conceded that the plaintiffs, by subpoenaing witnesses in the cause, on the third day of the return term, thereby subjected themselves to the jurisdiction of the court, so as to give the court jurisdiction to proceed to try the whole case upon its merits, it was not thereby authorized to affirm the judgment of the justice for a failure to prosecute said appeal, as was done in this case. For these reasons the judgment of the trial court is reversed and the cause remanded. All concur.

Baker v. Halligan.

BAKER V. HALLIGAN, *Appellant*.

Deed of Trust: TRUSTEE'S SALE. When enough has been realized from the sale of a portion of the property covered by a deed of trust to pay the debt, the trustee's power is at an end, and any further sale is a nullity.

Appeal from Phelps Circuit Court.—HON. V. B. HILL, Judge.

AFFIRMED.

Crews & Booth for appellant.

L. F. Parker for respondent.

HOUGH, J.—This is a suit brought by plaintiff to set aside a sale of his land under a certain trust deed. On the 1st day of June, 1872, one S. M. Davidson borrowed of S. M. Jones \$1,547.24, for which he executed his promissory note, payable one day after date, with interest at ten per cent per annum, and secured the same by a deed of trust to the defendant Halligan, on the following lands in Phelps county, Missouri: Southeast quarter and southwest quarter and the northwest quarter of section 16, except ten acres off said northwest quarter, and southeast quarter of the southwest quarter and south half of the southeast quarter section 9, all in township 39, range 6 west. At the time of the execution of this deed of trust, it was verbally understood and agreed between Jones and Davidson, that Davidson might sell any of the lands conveyed by said deed, and upon payment to said Jones of the purchase money arising from such sales, Jones would release the lands sold. Soon thereafter Davidson sold the land in section 9 to one Patton, and paid to Jones Patton's cash payment to him of \$465, and Jones thereupon executed a deed of release of said land, and Davidson, with the consent of Jones, received Patton's note for the balance of the purchase money, amounting to something less than \$200,

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which Davidson collected, and paid part thereof to Jones; how much does not definitely appear. On the 28th day of July, 1873, Davidson sold and conveyed to plaintiff the northwest quarter of section 16, aforesaid, except ten acres in the northwest corner thereof, for \$1,050, of which sum plaintiff paid \$600 in cash, and for the balance, \$450, gave his note payable in eighteen months, with eight per cent interest. Of the cash payment, \$565 was paid by Davidson to Jones and by him credited on Davidson's note. On the 21st day of April, 1874, Davidson transferred to Jones Baker's note for \$450. Davidson, Jones and one other witness testified that Jones purchased this note, but two other witnesses testified that Jones stated in their presence that it was received by him from Davidson in part payment of his note to him, Jones; and it appears from the decree that was rendered that the circuit court so found. On the evidence preserved in the bill of exceptions, we accept this finding as conclusive. Baker's note for \$450 was fully paid on the 6th day of September, 1875, at which time one witness testifies that Jones agreed to release Baker's land from the deed of trust given by Davidson; this Jones denied. There is a conflict of testimony as to the amount paid by Davidson on his note to Jones. The admitted payments are, cash October 1st, 1872, \$465; November 26th, 1872, \$41.55; August 13th, 1873, \$560. On December 11th, 1877, Halligan, as trustee, sold all the lands conveyed to him, and realized therefrom the sum of \$405, \$305 of which was realized from the sale of other lands, before the plaintiff's land was offered for sale. This tract brought at said sale the sum of \$100, and all of said lands were purchased by said Jones.

By allowing the plaintiff's note to Davidson as a credit on Davidson's note to Jones, and deducting the admitted payments, it will be seen that at the time the sale was made by Halligan, the trustee, there was due to Jones on the Davidson note, the sum of \$268.31. As the sum of \$305 was realized by the trustee before offering the plaintiff's

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iff's land, and the entire indebtedness of Davidson to Jones was thereby discharged, and the mortgage satisfied, the trustee had no power to sell the plaintiff's land, and his act in so doing was a nullity. The decree of the circuit court declaring the mortgage satisfied, and investing the plaintiff with title to the land purchased by him from Davidson, will, therefore, be affirmed. The other judges concur.

BONINE V. THE CITY OF RICHMOND, *Appellant*.

1. **City Sidewalks:** QUESTION OF LAW. Whether it is the duty of a city under its charter to keep its sidewalks in repair, is a question of law, and should not be submitted to the jury.
2. **Instructions.** An instruction containing simply an abstract principle of law, having no practical bearing on the case, is properly refused.
3. **Municipal Corporations:** THEIR LIABILITY FOR DEFECTIVE SIDEWALKS. To fix upon a municipal corporation liability for an injury occasioned by a defect in a street, it is not essential to show that the corporate authorities had actual knowledge of the defect. It is enough if a state of circumstances existed from which notice could have been reasonably implied. But without one or the other of these there is no liability.

Appeal from Clinton Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED.

Shotwell & Ball and James L. Farris for appellant.

Joseph E. Black, James W. Black, C. T. Garner & Son
and *John Mason* for respondent.

NORTON, J.—This is a suit instituted by Eliza Bonine, in which her husband is joined, to recover damages for alleged personal injury occasioned, as averred, by the care-

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lessness and negligence of defendant in suffering a board upon the sidewalk on the north side of Lexington street, in defendant city, to become loose, so that a person stepping on one end of the board would cause the other end to fly up suddenly. The petition alleged that while plaintiff was walking along said sidewalk with her husband, and a little behind him, he stepped on one end of said board causing the other end to fly up, catching plaintiff's foot, whereby, without fault upon her part, she was violently thrown upon said sidewalk, whereby the bones of her wrist were broken, from the effects of which she lost the use of her arm. Defendant, in the answer, denies the allegations of the petition, and avers that if plaintiff sustained injury it was because of her own negligence.

The cause was tried in the circuit court of Clinton county, where it had been taken by change of venue, and judgment was rendered for plaintiff, from which defendant has appealed, and assigns as the chief ground of error the action of the court in refusing the following instructions asked by the defendant:

1. Unless the jury believe from the evidence that the defendant was by its charter required to keep the streets and sidewalks in a reasonably safe and good traveling condition, they will find for defendant.

3. Although the jury may believe from the evidence that said sidewalk was not in a reasonably safe traveling condition, yet if they further believe that the condition thereof was not known to the corporation, they will find for defendant.

4. Although the jury may believe from the evidence that the plaintiff, Eliza Bonine, stumbled and fell on a loose plank of said sidewalk, yet if they further believe that on the evening before the show the street commissioner carefully nailed down all loose plank on the sidewalk, and that on the day of the show, a large crowd passed over said sidewalk, and that the city authorities were not aware of

the fact of said plank being loose, then defendant was not guilty of negligence, and they will find for defendant.

7. A municipal corporation is not an insurer against accident on the street and sidewalks, nor is every defect therein, though it may cause the injury sued for, actionable.

9. Although the jury may believe from the evidence that plaintiff was injured in consequence of a defect in defendant's sidewalk, unless they further believe from the evidence that defendant had notice of the defect in the sidewalk which caused the injury, or facts from which notice might reasonably have been inferred, they will find for defendant.

The first instruction was properly refused, because it submitted a question of law to the jury. It was the province of the court and not the jury to determine whether or not, under the charter, it was the duty of defendant to keep its streets and sidewalks in repair.

The third instruction was properly refused, as it predicated defendant's non-liability on the fact alone of actual knowledge by it of the defect, and wholly ignored all other elements of liability. The fourth instruction is vicious for the same reason.

The seventh instruction asserts simply an abstract principle of law having no practical bearing on the case, misleading in its character, and was, therefore, properly refused.

The ninth instruction, though objectionable in its phraseology, and wanting in perspicuity, we think should have been given, as the refusal of it deprived defendant of the benefit of the principle governing in such cases, viz: That before the defendant could be made liable, it must be made to appear either that the corporate authorities knew of the defect which occasioned the injury, or had been notified of it, or that a state of circumstances existed from which no-

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question of law.

2. INSTRUCTIONS.

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tice could have been reasonably implied. Mr. Dillon in his work on Corporations, (3 Ed.) sections 1024, 1025, states the rule thus: "Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as those caused by the wrongful acts of others, but as in such case the basis of the action is negligence, notice to the corporation of the defects which caused the injury, or facts from which notice thereof may be reasonably inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied is essential to liability." "In the class of cases last referred to, the corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents, after the unsafe condition of the street is known to it or its officers having authority to act respecting it. * * If such a body by its officers and servants have the means of knowing that a highway is unfit for travel and are negligently ignorant of its state, they are guilty of negligence."

The same principle is announced in Shearman & Redfield on Negligence, sections 148, 149, and is fully sustained by the following authorities: *Russell v. Town of Columbia*, 74 Mo. 480; *Colby v. City of Beaver Dam*, 34 Wis. 285; *Manchester v. City of Hartford*, 30 Conn. 118; *City of Springfield v. Doyle*, 76 Ill. 202; *Mayor v. Sheffield*, 4 Wall. 189; *Dewey v. City of Detroit*, 15 Mich. 307. In the last case above cited, the plaintiff sued the city for damages occasioned by being tripped up by a loose board in a sidewalk, the injury having occurred by reason of the plank being raised suddenly by a person stepping upon one end of it, so that plaintiff when passing caught his foot under it, as it was so raised, and was thrown down and injured. That case is on all-fours with the case at bar, and presented the same questions here involved, and in the disposition of it, it was said by the court: "That if a defect is found which the city ought to have known, and which it has failed to

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repair within a reasonable time after such knowledge may be presumed to have reached it, as under all the circumstances was sufficient for such repairing, then there is a good cause of action, but not otherwise."

It appears from the record before us, that the evidence tended to show that defendant, through its agent, the street commissioner, the day before plaintiff was injured by the loose plank on the sidewalk, had repaired the sidewalk by nailing down all the plank, and that on the next day large crowds of persons in the town for the purpose of witnessing a circus, had passed over the sidewalk, whereby the plank was loosened. This evidence clearly entitled defendant to have in an instruction the benefit of the principle we have discussed herein, and as it was denied to it, the judgment will be reversed and the cause remanded, in which all concur.

BLACK, *Appellant*, v. ROGERS.

1. **Attorney and Client: COMPROMISE OF SUIT.** The compromise of a pending suit by an attorney having apparent authority, will be binding upon his client, unless it be so unfair as to put the other party upon inquiry as to the authority, or imply fraud.
2. **Judgment.** An order of court was in these words: "Now at this day this cause is compromised and settled as per stipulation now filed, each party to pay his costs," *Held*, that, though neither formal nor full, this was a judgment of like binding force on the parties as any other judgment.
3. — : **COMPROMISE.** One of the parties to a judgment rendered upon a compromise denied its validity on the ground that the compromise had been made by his attorney in violation of instructions. It appeared, however, that he became aware of all the facts the same day that the judgment was entered, but permitted the term to elapse without taking any step to set it aside. *Held*, that it was conclusive upon him.
4. **Agreement to Arbitrate, when Enforceable.** In a suit in which

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the chief matter in dispute was a boundary line, judgment was rendered in accordance with an agreement settling this line, which provided, as auxiliary thereto, for the purchase of a small strip of land and a hedge by the one party from the other, at a valuation to be made by arbitrators to be selected by the parties. One of the parties having refused to select an arbitrator, *Held*, that the court had power to cause the valuation to be made by its own officer.

Appeal from Saline Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

This was an action of ejectment between adjoining proprietors brought to determine the right to a strip of land on their common boundary line. A prior action between the same parties for the same land had been terminated by a compromise and the entry of the following order: "Now, at this day, come the parties by their respective attorneys, and the jury herein re-assembles and the trial of the cause is proceeded with. And now at this day this cause is compromised and settled as per stipulation in writing now filed, each party to pay his costs."

The stipulation referred to was as follows: "This suit is compromised on the following terms: The line between the parties shall be established as follows: Run south from a point thirteen feet west of plaintiff's hedge on north, to the fence of defendants extending from the hedge to township line, thence with said fence to township line. The defendants to pay the value of hedge fence from the half mile point from the north corner to south end of hedge, and to pay plaintiff for the thirteen feet lying west of the hedge, and thirteen east of the fence, so as to make line straight. The whole then to be partition division fences between plaintiff and defendants. The value of the land on west of hedge and east of fence, and the hedge south of the half mile point, to be ascertained by two disinterested persons, one chosen by each, and the two thus chosen to select a third, who shall make a valuation; then

each party to pay their own costs, the suit being dismissed. The plaintiff and his tenants to have right of way south or north through any gates used by defendants on their land." This stipulation was signed by Letcher and Vest, attorneys for Black, the plaintiff, and by Shackelford and Boyd, attorneys for Samuel and James Rogers, the defendants.

The answer in the present case set up this compromise as a defense and prayed for specific performance of its terms. The reply put in issue the authority of Messrs. Letcher and Vest to make the compromise. This issue was submitted to a jury, who found for the defendants. The court adopted the finding, and after a further hearing found upon the whole case for the defendants, and entered judgment establishing their right to the land in dispute, and the right of plaintiff to a private way according to the stipulation, and also directing that each party be allowed to select a disinterested person whose duty it should be, in conjunction with a third person to be selected by them, to make the valuation provided for in the stipulation, and appointing John H. McDaniel, Esq., commissioner, and directing him, in case the parties or either of them should refuse to make such selection, to take an account of the value of the land and the south portion of the hedge by hearing evidence, and to report the same to the court, and further directing that upon the payment of the amount thus ascertained to the plaintiff by defendants, or in case of refusal of plaintiff to accept the same, deposit of same in court for plaintiff's use, then the plaintiff should convey to the defendants the strip of land specified, and further declaring that plaintiff be forever enjoined from prosecuting his ejectment suit, and that said decree operate as a final settlement of the division line between the lands of plaintiff and defendants.

On behalf of plaintiff the testimony was that he had authorized his attorney to compromise upon the basis of a survey made in 1852 of the dividing line; the payment to

him of the rents from 1870 of the thirteen foot strip which respondents conceded to be his, and of the rent on the excess of hedge; that he also stipulated for the right of way west of the hedge for himself and tenants; that on these terms he agreed to settle, and sell to respondents all the land west of the hedge and the hedge south from the half mile point; that the survey of 1852 would have given appellant about seven acres west of the hedge; that he did not hear what passed between counsel while effecting the compromise, nor was he near enough to do so, and did not hear the agreement read; that he did not hear the announcement in court that the case was settled; that when he did hear, for the first time, on the street, that the case was settled, he supposed it was upon the terms authorized by him; that he obtained a copy of the settlement, took it home with him and read it that night, was astonished that neither the survey of 1852 nor the rents of the land and hedge were mentioned; that the next morning he rode into Marshall and urged his attorney, Mr. Letcher, to have the judgment set aside. Mr. Letcher testified that he said to appellant in reply that as the matter had been arranged between Mr. Vest and Mr. Shackelford, and the latter was gone, he did not see how anything could be done before the next term of court, at which time the case would come up, the stipulations according to his view providing that the terms were to be carried out and that the suit was to be dismissed.

The testimony on behalf of defendants was, in substance, that the first action came on for trial on the 13th day of October, 1877, and progressed until the adjournment of the court on the next day for dinner; that before the court met again, Mr. Vest, in the court room, made to the counsel for defendants an overture of compromise, who proposed some modification, to which Vest replied that he would see his client about it, and he did go into the back part of the room and hold a conversation with him. He returned and said his client wished the privilege of passing;

over a road that defendants might keep open west of the hedge, and would agree to the compromise. The agreement was then written and read. Some of the witnesses testified that plaintiff was present at this time within a few feet, near enough to hear; and that he afterward said, on the same day, that he was glad the matter was settled, that he was all the time willing to compromise, but that respondents would do nothing. When the court met after dinner, Mr. Vest announced publicly that the case had been settled as per written stipulations, which he then filed.

Davis & Cooney for appellant.

An attorney has no authority arising from his employment in that capacity to compromise the claims of his client; such authority, whenever it exists at all, does so by reason of the client specially conferring on his attorney the power to effect the compromise in the given case. *Story on Agency*, § 99; *Hall v. Hopkins*, 14 Mo. 450; *Taylor v. Labaume*, 14 Mo. 572; *Quarles v. Porter*, 12 Mo. 76; *Davidson v. Rozier*, 23 Mo. 387; *Walden v. Bolton*, 55 Mo. 405; *Spears v. Ledergerber*, 55 Mo. 465; 1 *Parsons on Cont.*, 113. An attorney authorized to compromise a suit is a special agent to perform a single act, and must be governed by instructions; and if he exceeds the special and limited authority given him, he does not bind his principal. *Story on Agency*, §§ 99, 125; 1 *Parsons on Cont.*, ch. 3; *Walden v. Bolton*, 55 Mo. 405. The fact that appellant was present in court does not show that he had any knowledge of what was passing between the attorneys with reference to the compromise. In the former trial of this cause, there was no decree or judgment of the court rendered upon the stipulations filed. The whole proceeding of the compromise was a surprise to plaintiff, and his presence in court cannot be made a trap to catch him in, and fasten upon him, by any means of construction, a knowledge of facts.

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which from the evidence it is clear he never had. *Evans v. Llewellyn*, 1 Cox 340; s. c., 2 Bro. Ch. 150.

Charles A. Winslow for respondents.

The judgment rendered in the former suit was a final judgment, and appears so entered on the record. Appellant's reply is a general denial of the answer, and contains nothing in avoidance of the judgment. To avoid it on equitable grounds, for any recognized cause, he should have set up the equitable matters relied on in his reply. The judgment settled all matters in dispute between the parties, and is very much unlike an ordinary judgment in ejectment.

Appellant's attorney had apparent authority to sign the compromise agreement. It is admitted that he was authorized to make a compromise. There is no evidence or pretence that respondents or their attorney had any knowledge or intimation of the pretended limitation upon the authority; on the contrary they acted on the assumption, fully warranted by the presence and conduct of the appellant, that the authority was ample, and knew nothing to the contrary until long after the judgment was entered and court had adjourned. Under these circumstances, the compromise was binding, unless so flagrantly unfair as to imply fraud or put the respondents on inquiry. Wharton on Agency, § 594; Weeks on Att'ys at Law, § 230. The compromise was a very fair and just settlement of the controversy, establishing the boundary line in a manner which should have been satisfactory to appellant, as otherwise a strip of his land, thirteen feet wide and two-thirds of a mile long, would have been cut off from his farm by a permanent hedge. Selling this strip at a fair valuation, straightening the line, and securing its permanent location in conformity to this hedge, and simply giving up the rents of the disputed strip and part of the costs, for which the stipulated right of way may have been a full compensa-

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tion, was certainly a favorable compromise for appellant, and one which his attorney might well have made without any special authority. Wharton on Agency, § 590. The survey line of 1852 was the only other matter in dispute, and the surveyor had testified that he was not able definitely to locate the line, though the southern end of it fell west of respondents' fence. Appellant could not have recovered up to that line on his own testimony, and respondents' evidence as to an agreed line yet remained.

The preponderance of the evidence shows that appellant's attorney had express authority to make the compromise—and this issue of fact was found in favor of respondents by the jury, and this finding sustained by the trial court. Agreements for a compromise will be enforced like other agreements. *Fugate v. Robinson*, 18 B. Mon. 680; *Johnson v. Johnson*, 40 Md. 189.

This case falls clearly within one of the exceptions to the rule that courts will refuse to enforce simple contracts of sale where the price is to be fixed by arbitrators. *Pomeroy on Cont.*, p. 213, § 151; *Providence v. St. John's Lodge*, 2 R. I. 46; *Dike v. Greene*, 4 R. I. 285; *St. Louis v. Gaslight Co.*, 70 Mo. 69; *Gourlay v. Somerset*, 19 Ves. (1 Am. Ed.) 429; *Jackson v. Jackson*, 1 Smale & G. 184; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Smale & G. 119; *Dinham v. Bradford*, 5 Chan. App. Cas. 519; *Richardson v. Smith*, 5 Chan. App. Cas. 648; *Smith v. Peters*, L. R., 20 Eq. 511; *Fry Spec. Perf.*, (2 Am. Ed.) §§ 217, 219; *Waterman Spec. Perf.*, § 47, p. 43, § 148, p. 193.

I.

SHERWOOD, C. J.—The facts in the case show that the attorney for the plaintiff had either the actual or else the apparent authority to make the compromise. The plaintiff was distant but a few feet and in plain view while the compromise was being effected. During the progress of the negotiations, his attorney, not feeling altogether satisfied with a proposal on a certain point, went back to his client, held

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a conference with him and returning, said, that with a named modification, his client would agree to the compromise. The desired concession was made by the defendants, and thereupon the compromise was drawn up and signed by the respective attorneys, Vest and Shackelford, judgment entered upon the agreement and the pending cause dismissed while the defendants with their attorneys were in the court room, and while, according to the testimony of Mr. Letcher, the plaintiff was also there present. There is no pretense that there was any fraud practiced on plaintiff in making the compromise, or that plaintiff's attorney had no authority to make a compromise; and the law is settled that while a compromise made by an attorney without authority or in violation of his client's commands will not be enforced to the client's injury, yet, if the authority of the attorney be apparent, then his client will be bound, unless the compromise possessed such elements of intrinsic unfairness as to provoke inquiry or imply fraud. Wharton Agency, § 594, and cases cited; Weeks on Attorneys at Law, § 230. And the compromise in this case bears no such indications, and it is evident the plaintiff either heard the compromise agreement made or else could have done so with a very little exertion on his part.

II.

The judgment entered upon the compromise agreement, though neither formal nor full, was of like binding force on the parties thereto, when rendered, as any other judgment; and no appeal was taken therefrom, or motion or application of any sort made to set that judgment aside, though court remained in session, and plaintiff came into town next day with a copy of the agreement which he had taken home with him and read for the first time the night before, and complained to one of his attorneys that it did not correspond with what he had authorized. If this was the case then his neglect was inexcusable in failing to acquaint himself with the terms; and on being in-

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formed what the terms of the agreement were, he should have taken the necessary steps promptly to have prevented the judgment, in consequence of the term going by, from hardening into final and irremediable conclusiveness. But no such steps were taken, and in consequence thereof, all the matters then controverted must be regarded as *res judicata*, and, therefore, no longer open to re-agitation.

III.

But the claim is made that that portion of the judgment relating to the appointing of persons by the parties to value the strip of land thirteen feet in width, is not enforceable. This is the general rule as to the selection of persons to fix the valuation of the subject matter of the contract. In a word, agreements to arbitrate are incapable of specific enforcement. *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burklee*, 58 Mo. 202; *St. Louis v. Gaslight Co.*, 70 Mo. 69. But though this is the general rule it is not the universal rule. The rule has its well ascertained exception. This exception occurs when the essence of the agreement does not consist in the fixing of a value by arbitrators, but the fixing of such value is merely subsidiary or auxiliary to the principal agreement. As, for example, an estate is sold and the timber on a part to be taken at a valuation. In such case it is held that though the valuation cannot be made *modo et forma*, yet, that the court finds no difficulty, but in relation to such minor matters will substitute itself in the place and stead of the arbitrators, since the case is not one where no contract can be made out except through the intervention of arbitrators, but where a valid contract exists independent of their action.

In this case the parties to the compromise agreement can never be restored to their *statu quo*. That opportunity is forever gone, by reason of the judgment rendered. So far as concerns the matters embraced in that judgment they cannot be re-litigated. The main object of the contract and judgment of compromise was not the sale of a

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strip of land thirteen feet wide, but the adjustment of a matter hotly litigated, the settlement of a disputed boundary, and the absolute cessation of all litigious strife in respect thereto. But the disputed boundary has been irrevocably fixed by the judgment rendered upon the compromise agreement. A mere incident of that agreement is the fixing of the valuation of the paltry strip of land. In such circumstances, if we are to be guided by the authorities and sound reason, we cannot well hesitate. This evidently was the view taken of the matter by the circuit court, and we affirm the judgment. All concur.

SMALLWOOD *et al.*, Appellants, v. LAFAYETTE COUNTY.

1. **County Courts.** The county courts have no power to issue certificates of county indebtedness. Such a certificate is, therefore, no evidence of debt.
2. **Set-off: DEBTS DUE IN CAPACITY OF TRUSTEE.** A demand due to a county for money borrowed of the county school fund may be set-off against a demand due by the county for services rendered on behalf of the same fund, and which by contract are to be paid for out of it. The county stands in the position of trustee as respects both demands. See *Gansner v. Franks*, *ante*, p. 64.

Appeal from Lafayette Circuit Court.—HON. WM. T. WOOD,
Judge.

AFFIRMED.

Graves & Wood for appellants.

The certificate of indebtedness was payable out of the general expense fund of the county. It was an acknowledgment of general indebtedness by the county to Hixon. The school fund notes and judgment thereon were not due the county from Hixon in its own right. They were due

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the county simply as trustee. *Ray Co. v. Bentley*, 49 Mo. 242. In a suit against a defendant, a debt held by defendant as trustee, cannot be used as a set-off. *McDonald v. Harrison*, 12 Mo. 447; *Waterman on Set-off*, (2 Ed.) § 191.

William Young for respondent.

The so-called certificate of indebtedness, issued by the county clerk, was wrongly admitted. It could prove nothing. By law the county court only has power to audit claims against the county. *Wag. Stat.*, p. 441, § 9. Such power cannot be delegated, and any contract delegating such authority is so far void. Plaintiffs took the claim of Hixon against defendant, subject to all of the equities and set-offs defendant had against Hixon.

HENRY, J.—The suit herein was for a balance due upon the contract which is set forth in the following certified copy of the record of Lafayette county court and upon the following certificate of indebtedness:

LAFAYETTE COUNTY COURT,
September Term, second day, Sept. 8, 1874. }

Now, at this day, come Hixon and Russell, and present to the court here a contract, in which they propose to prove certain swamp lands in this county and receive compensation for the same, and which said proposition was heretofore filed in the office of the clerk of this court on the 21st day of July, 1874, and which said contract is in words and figures following, to-wit:

This agreement, made and entered into this 24th day of June, 1874, by and between William Hixon and Charles B. Russell, parties of the first part, and the county of Lafayette, party of the second part, witnesseth: That the said parties of the first part have been appointed by the county court of Lafayette county, commissioners to hunt up and obtain proof on all lands that were entered by individuals between the years 1850 and 1857, inclusive, being

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the lands returned by the county surveyor as swamp or overflowed lands, and, whereas, Col. Babbitt, United States Swamp Land Commissioner, and Captain Bergau, Swamp Land Commissioner for the State of Missouri, have arrived and are ready to hear evidence on the character and swampy condition of the same in the year 1850 and since that date, said parties of the first part are to furnish such and all legal evidence and proof of said land to said Babbitt and Bergau, commissioners as aforesaid, that they may be able to do; and for all lands that they, the said parties of the first part, may prove up as swamp land in the year 1850, before said commissioners, and upon which the county, on account of proof so made, shall have established before said commissioners her right to have pay for the same from the general government, they are to have, and to be paid by said county of Lafayette at the rate and price of thirty cents per acre on all lands so proved up aforesaid, except those lands for which the government received twelve and a half cents, and our commission for the proving up of the "bit" land, shall only be six and a quarter cents for each and every acre so proved up. If the proper proof is adduced the county will acquire land warrants for 1,440 acres of land, and our commission will be one-half of all land warrants received by the county, said commissions, etc., not to be paid until the county shall have received the moneys, warrants, etc., from the general government, through the State Treasurer of the State of Missouri. It was thought by the register of lands of this State that he would be able to get from the government \$1.25 per acre for all lands so proved up, that is, for all the "bit" land; in that event we are to receive thirty cents per acre on all lands proved up, except that for which land warrants may be issued; and when the testimony on all the swamp land in the county shall have been completed before said commissioners, then the clerk of this court, under his seal, is to give to the said parties of the first part a certificate of indebtedness to the amount of what may have been proved

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up in accordance with this contract and to be paid as above stated, the amount of \$613 to be deducted from the amount which may be due us, and to be deducted before we receive any of said funds ourselves.

(Signed)

WM. HIXON.

CHAS. BEN. RUSSELL.

Plaintiffs allege that there was a settlement between Hixon and the county on the 8th day of September, 1874, by which it was ascertained that the county was indebted to him in the sum of \$1,352.60, for which a certificate of indebtedness was issued to him by the county court on the 11th day of September, 1874, which was subsequently assigned by him to plaintiffs, and this suit is to recover of the county the amount named on the certificate.

It appears from the evidence that at the date of the assignment of the certificate to plaintiffs, Hixon was indebted to the county by notes given for school moneys borrowed by him, in an amount exceeding the amount of the certificate of indebtedness, and this was pleaded and allowed, as a set-off against plaintiffs' demand, and this is their ground of complaint.

By the contract, the indebtedness evidenced by the certificate was payable out of the funds which should be received by the county from the general government for swamp lands. There was no express agreement to that effect, but that such was the understanding of the parties is fairly inferable from the terms and the character of the contract. The labor Hixon was employed to perform was exclusively in reference to the swamp lands, the proceeds of the sales of which belong to the school fund, and it is expressly stipulated in the contract, that: "When the testimony on all the swamp land in the county shall have been completed before said commissioners, then the clerk of this county court, under his seal, is to give to said parties of the first part a certificate of indebtedness, to the amount of what may have been proved up in accordance

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with this contract and to be paid as above stated, the amount of \$613 to be deducted from the amount which may be due us, and to be deducted before we receive any of said funds ourselves." The order of the county court is in substance that the county of Lafayette is indebted to Hixon as per contract, etc., in the sum of \$1,352.60, "to be paid to him, or his order, so soon as the indemnity swamp land fund shall have been received from the general government, which is now due." The clerk in vacation issued the certificate in question, but failed to state therein the fund out of which it should be paid.

We have failed to find any statutory provision which authorizes a county court to issue certificates of county indebtedness, and, therefore, this certificate is not even *prima facie* evidence of the indebtedness it certifies.

The law relied upon by appellants, is not applicable to this case. It is true that in a suit against one for debt, he cannot set-off a debt due to him as trustee. *McDonald v. Harrison*, 12 Mo. 447. But in this case, both the demand of the county against Hixon, and his against her, were in favor of, and against, the county as trustee of the school fund. All concurring, the judgment is affirmed.

WHITE, Appellant, v. THOMAS.

Assignee for Benefit of Creditors: HIS LIABILITY FOR RENTS: PRACTICE. An assignee who, in the conduct of the business of his trust, continues in possession of premises let to his assignor, does not thereby subject himself to a personal liability for the rent. To create such liability there must be a special agreement. And when the assignee is sued personally, the fact that he may have assets as assignee will not authorize recovery.

Appeal from Pettis Circuit Court.—HON. WILLIAM T. WOOD,
Judge.

AFFIRMED.

E. J. Smith for appellant.

Heard & Jackson for respondent.

NORTON, J.—It appears from the petition in this case that plaintiff was the owner of a business house in the city of Sedalia, and, on the 1st day of June, 1877, leased the same to Vreeland & Co. for the term of one year, (with the privilege of renewing the same for five years,) at \$70 per month payable in advance. Vreeland occupied the house as a drug store, till September 29th, 1877, at which time he made an assignment of all his property to defendant as assignee for the benefit of his creditors. After the assignment, defendant continued to occupy the house, the stock of drugs remaining therein, till about the 20th day of January, 1878, when he disposed of them and then surrendered possession of the premises to plaintiff. It is then averred in the petition that after said assignment was made, plaintiff informed defendant of said leasing, and that it was then agreed between them, that till defendant disposed of the stock of drugs, he should occupy the house the same as said Vreeland had done, and collect rent from the under-tenants, and pay plaintiff \$70 per month therefor; that defendant promised to pay plaintiff \$70 per month when he sold the goods; that defendant occupied the house until the 20th day of January, 1878, and that the rent due therefor was \$266.66, which defendant refused to pay, and for which he asked judgment against him. Defendant in his answer denies the agreement set up in the petition, and avers that he did not occupy the house under any such agreement, but under the lease which plaintiff had made

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to said Vreeland, which did not expire, according to its terms, till the 1st day of June, 1878.

On the trial judgment was rendered for defendant, from which plaintiff has appealed, and assigns for error the action of the court in refusing instructions asked by plaintiff, in giving an instruction of its own motion, and in giving instructions asked by defendant. The instructions asked by plaintiff, are as follows:

1. That if defendant, as assignee, continued in possession of the store-room, and occupied the same for the purpose of disposing of the property assigned to him, under the same terms and conditions as it was occupied by his assignor, then the jury will find for plaintiff in such sum as they may believe from the evidence may be due.

2. That if defendant occupied under the lease to J. B. Vreeland & Co., he is bound to pay full rents the same as said Vreeland & Co. agreed to pay.

3. That if, after the assignment to defendant, plaintiff and defendant met and agreed that defendant should occupy the premises and collect rent from the under-tenants till he should dispose of the stock of goods assigned to him, and pay plaintiff \$70 per month for the same, then the jury will find for plaintiff.

The first and second instructions were properly refused, because this is not a proceeding to charge the trust property with the payment of rent, but to recover a personal judgment against defendant, upon his alleged agreement to pay a stipulated rent.

Whatever of error, if any there was, in the refusal of the third instruction, was cured by the action of the court in giving, of its own motion, the following: "If after the assignment of Vreeland to Thomas, the plaintiff and defendant agreed that defendant should occupy the premises not under the lease but under a new contract then made, and collect rent from the under-tenants, till he disposed of the goods assigned and pay plaintiff \$70 per month for the same, the jury will find for the plaintiff." This instruc-

tion put to the jury the question in issue as raised by the pleadings.

It is also objected that the court erred in giving defendant's instructions in which the jury were told that defendant was not liable on account of the lease to Vreeland & Co., or on account of any occupation under it, or on account of any contract or liability of said Vreeland & Co., or said Vreeland; that to entitle plaintiff to recover, it devolved on him to establish that defendant in his individual capacity entered into a contract with plaintiff for the renting of the store-house, for the use and occupation of which defendant personally promised to pay plaintiff, and that it was immaterial whether defendant had in his hands any assets as assignee of said Vreeland. We perceive no error in giving these instructions, as they applied to the case made by the petition and answer, and the plaintiff could only recover upon the case so made. It was sought to make defendant personally liable for rent, and in said instructions the court in effect told the jury that before they could so find they must believe that he personally, and not as assignee, bound himself. The doctrine laid down by Burrell on Assignments, page 608, to which we have been cited, and where it is said "that assignees are bound to pay rent to the landlord for the period during which they occupy the premises for the purpose of discharging the duties of the trust," would be applicable in a suit instituted against the assignee to charge the trust funds in his hands with the payment of such rent. But such is not the character of this suit, and, therefore, the authorities to which we have been referred have no application.

The questions raised by the pleadings were fairly submitted to the jury, and finding no error, the judgment is affirmed, in which all concur.

Wheeler & Wilson Manufacturing Company v. Tinsley.

WHEELER & WILSON MANUFACTURING COMPANY, *Plaintiff in Error*, v. TINSLEY.

- 1 **Pleading : NEW MATTER.** In an action on a bond given by an agent for the faithful performance of his duties the petition alleged, as breaches of the bond, that the agent had failed to account truly as to the subject matter of his agency. At the trial evidence was offered by defendants tending to show that a full adjustment of all matters relating to the agency had been had and the agent had paid a portion of the balance found against him in money and had given his note for the remainder. *Held*, that this evidence tended to show that there had been no breach ; that the facts, therefore, did not constitute new matter within the meaning of the code, and so might be given in evidence without being specially pleaded.
2. **Wife as a Witness for her Husband.** In order to render a married woman competent as a witness, under the statute, when her husband is a party, it must appear that the matter to which she is called to testify, was a business transaction which was had and conducted by her as the agent of her husband. The fact of her agency must be shown by some witness other than herself.

Error to Pike Circuit Court.—HON. G. PORTER, Judge.

REVERSED.

Elijah Robinson for plaintiff in error.

E. T. Smith for defendant in error.

HOUGH, J.—This is a suit on the bond of one Tiffany, an agent of the plaintiff, given for the faithful performance of his duties as such agent, according to the terms of a written contract entered into between him and the plaintiff. The petition alleged as a breach of said bond the failure of the agent to account for sundry items of indebtedness to the plaintiff, incurred by him under his contract as agent and for sundry machines received by him as such agent. The defense was a general denial. Evidence was given on behalf of the defendants tending to show that a full adjustment of all matters relating to the agency of Tiffany,

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covered by the bond sued on, was had between Tiffany and the plaintiff, and in settlement thereof, Tiffany paid the sum of \$40, and executed his note for the balance. This testimony was objected to, on the ground that no such defense had been specially pleaded, and the testimony was inadmissible under a general denial.

We think the testimony was admissible. The breach alleged was that the agent had failed to account for the property received by him, and had failed to pay all liabilities incurred by him as agent, according to the terms of his bond. The testimony relating to the settlement tended to show that there had been no breach, as alleged. We do not think these facts constituted new matter, within the meaning of the code.

1. PLEADING: new matter.

Error is also assigned upon the action of the court in permitting Mrs. Tiffany, the wife of the agent, to testify in the cause. Mrs. Tiffany was not a competent witness to prove her own agency.

Williams v. Williams, 67 Mo. 661. The only testimony other than her own, which tended to show any agency on her part, was that of her sister, who testified that whenever her husband was absent she acted as his agent. In order to render a married woman competent as a witness, under the statute, when her husband is a party, it must appear that the matter to which she is called to testify, was a business transaction which was had and conducted by her as the agent of her husband. There was not a scintilla of testimony that she ever did anything as the agent of her husband in relation to the settlement. There was no testimony indeed, other than her own, showing a single business transaction which she ever conducted in his absence. Her competency depends solely upon the fact that the matter about which she is called to testify was conducted by her as agent, and this fact must appear before she can be permitted to take the stand. As the competency of Mrs. Tiffany as a witness under section 4014 of the Revised

2. WIFE AS A WITNESS FOR HER HUSBAND.

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Statutes, was not sufficiently shown, she was improperly permitted to testify. The judgment will, therefore, be reversed and the cause remanded. The other judges concur.

ZOLL V. SOPER, Plaintiff in Error.

1. **Fraudulent Conveyance**: ACTION TO SET ASIDE: LIMITATION. So long as the right to have execution upon a judgment continues, the plaintiff may maintain an action to have the judgment declared a lien on land fraudulently conveyed by the defendant. To maintain such action it is not necessary that the land shall first have been sold under execution. The creditor may, however, if he chooses, pursue that course.
2. ——— : ——— : JURISDICTION. The fact that the fraudulent debtor is dead does not make such an action cognizable in the probate court. His estate has no interest in the matter. The circuit court is the proper forum.
3. ——— : ——— : INTEREST. A decree establishing the lien of a judgment creditor upon land fraudulently conveyed by his debtor, properly allows interest upon the original judgment from its date, at the rate therein specified.

Error to Johnson Circuit Court.—HON. N. M. GIVAN, Judge.

AFFIRMED.

F. P. Wright, Belch & Silver, E. A. Nickerson and G. W. Houts for plaintiff in error.

John J. Cockrell for defendant in error.

HENRY, J.—Plaintiff sues as the administrator of the estate of Jacobs & Kelly; and in his petition alleges that in April, 1866, he, as administrator of Jacobs & Kelly, obtained a judgment against John Yelton in the Johnson circuit court for \$2,554.79, and in May following on an execution issued on said judgment, realized about \$1,268;

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that Yelton had no other property out of which the debt could be made, except an equitable title to the land in controversy herein, sixty acres, which it is alleged, was purchased by Yelton with his own money, but the deed at his suggestion was made to his wife; and it was charged that this was a contrivance to delay and defraud his creditors; that Yelton died intestate in the fall of 1866, and that his widow, Sally, has since intermarried with and is now the wife of Charles Soper. The prayer of the petition is that said real estate be subjected to the payment of said judgment, and that defendant Sally be declared to hold the land in trust for payment of said judgment.

The answer denies all the allegations except that Sally Soper has the legal title to the land, and alleges that Francis M. Cockrell, William Cornetz and William Zoll purchased all the right, title and interest in and to the judgment in favor of Zoll, as administrator, and are the real parties in interest, and that plaintiff ought not to maintain this action. By his replication, this allegation is denied by plaintiff. The court on hearing the cause made a decree, adjudging that the judgment aforesaid was a lien on the land, and that the land be sold to satisfy the balance due on the judgment, and that out of the proceeds the sheriff should first satisfy the costs of this suit, and then pay to plaintiff the balance due on the judgment with ten per cent interest thereon from the 7th day of September, 1866.

The bill of exceptions having been stricken out, on motion of respondent, we are restricted in our examination of the cause to the record proper. That the petition states a case of fraud against Sally Soper and her former husband, John

1. FRAUDULENT
CONVEYANCE: ac-
tion to set aside:
limitation.

Yelton, is clear; and while in such a case, the creditor who seeks to subject the land to the payment of his judgment, might have the land seized and sold under execution, he may in the first place resort to equity, to have the fraudulent deed set aside in order to remove the cloud from the

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title, and sell the land to the best advantage. It is contended, however, that the judgment having been rendered in April, 1866, and this suit not having been instituted until August, 1873, the lien of the judgment had expired, and, therefore, plaintiff could not maintain this action. By section 11, page 791, Wagner's Statutes, volume 1, "Executions may issue upon a judgment at any time within ten years after the rendition of such judgment." While the right to have an execution on the judgment continues, the creditor may institute his suit to set aside a fraudulent conveyance made by his debtor, and subject the land to the payment of his debt. A sale under an execution in such case would be in effect but the sale of a law suit, and the land would be sacrificed, and no one could possibly be benefited materially, but the purchaser—and he only in the event that he succeeded in setting aside the fraudulent deed. While the creditor might have the land sold on execution, equity will not compel him to pursue that ruinous course.

It is insisted by appellant's counsel, that plaintiff's judgment should have been presented to the probate court
 2. ———; ———: and assigned to its class, and the relief he now
 jurisdiction. asks been sought in that court, and *Tittering-*
ton v. Hooker, 58 Mo. 593, is relied upon. But it has been repeatedly held by this court, that an administrator cannot impeach a voluntary conveyance of his intestate for fraud as to creditors, although the estate may be insolvent. *Brown's Adm'r v. Finley*, 18 Mo. 375; *George v. Williamson*, 26 Mo. 190; *Merry v. Freemon*, 44 Mo. 518. In *George v. Williamson*, it was held that any creditor may, in an equitable proceeding, have a conveyance in fraud of creditors set aside, and that a creditor who first files his petition obtains a priority if a sale is decreed; and that at the death of the fraudulent grantor the land so conveyed constituted no part of his estate. The administrator is not a necessary or proper party to a suit to set aside a conveyance of his intestate, alleged to have been made in fraud

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of creditors. *Merry v. Fremon*, 44 Mo. 518. Land conveyed by the intestate in fraud of his creditors, is not assets of his estate, and this distinguishes this from the case of *Titterington v. Hooker*, where the land belonged to the intestate at his death, and was subject to administration. If the land in controversy should be sold for more than may be required to pay plaintiff's demand, the surplus would not be assets of the estate, but would belong to Mrs. Soper, subject to the demand of any other creditor of her former husband who might maintain his suit against her for the purpose of enforcing its payment by her.

The court having found that the original judgment in favor of plaintiff against Yelton bore ten per cent interest 3. —: —: per annum, there was no error in the allowance by the decree herein of that rate of interest on plaintiff's demand from the date of the original judgment. Discovering no error in the record, the judgment, with the concurrence of all the judges, is affirmed.

BUCHANAN V. SMITH, *Appellant*.

1. **Res Judicata.** A construction of a contract once fixed by a decree of court, is *res judicata* between the parties to the decree.
2. **Defendant** was required by a decree of court to surrender to plaintiff certain notes. He surrendered them, but not until he had first collected and appropriated to his own use a portion of each. *Held*, that this was not a compliance with the decree, and that plaintiff was entitled to maintain an action for the amount so appropriated.

Appeal from Moberly Court of Common Pleas.

AFFIRMED.

Chas. A. Winslow for appellant.

W. T. McCanne for respondent.

HENRY, J.—In July, 1872, J. H. Burkholder purchased of C. C. Buchanan a parcel of land, about twenty-three acres, adjoining the town of Moberly, at the price of \$6,500, for which he executed his promissory notes, secured by a deed of trust on the land, which contained the following provision:

“And if said Burkholder shall sell said land, or any part thereof, for a fair and reasonable price, the said James H. Buchanan, party of the second part, shall release the part so sold from this deed of trust, provided the proceeds of such sale, money and notes, shall first be placed in hands of said James H. Buchanan as collateral security to secure the payment of the notes herein mentioned; and provided the notes taken for the deferred payments on such sale shall be secured by a deed of trust on the property so sold; and all moneys so received by said James H. Buchanan on such sales, or on or for such notes, shall be credited as payment on notes herein mentioned.”

Subsequently, Burkholder laid off the tract into town lots and sold two of the lots, one to Meyer and the other to Voth, for \$700 each, taking a deed of trust from the purchasers respectively to secure the purchase money. These notes he afterward assigned to the defendant, Joel Smith, to whom, in the years 1874 and 1875, Meyer paid on his note, \$375, and Voth paid \$225.

At the September term, 1876, Smith instituted a suit in the Moberly court of common pleas against C. C. Buchanan, to enjoin and restrain him from proceeding to sell said lots under the deed of trust executed by Burkholder to him, the result of which was a decree in C. C. Buchanan's favor, in which the court found and decreed that by the terms of the deed of trust from Burkholder to Buchanan, the latter was entitled to the notes against Meyer and Voth, assigned by Burkholder to Smith, and that

The State *ex rel.* Spencer v. White.

Smith should deliver them to Buchanan. Smith delivered the notes, but refused to pay to Buchanan the money he had received of the makers, and this suit is for the recovery of that amount. Plaintiff had judgment, and defendant has appealed.

The argument made by appellant's counsel would have been appropriate, if it had been addressed to the trial court on the hearing of the cause of Smith against Buchanan; or, if Smith had appealed from the judgment in that case we are inclined to think that appellant's argument now made, would have prevailed, but the matter is *res judicata*. The court placed a construction upon the clause of the deed of trust above quoted, which, however erroneous, must stand in the present controversy.

It is true, as the counsel contend, that the court did not order Smith by that decree to pay any money to Buchanan, but it did determine that the latter was entitled to the notes under his deed of trust the moment that Burkholder received them. If so, he was entitled to the notes to the extent of the obligation they imposed upon the makers, at the time they were executed. Delivering the notes, reduced by credits aggregating \$600, was a compliance with the letter, but not with the spirit of the decree. All concurring, the judgment is affirmed.

THE STATE *ex rel.* SPENCER V. WHITE, *Appellant*.

Inspection of Petroleum. It is not an offense within the purview of section 5843, Revised Statutes 1879, to sell petroleum oil for consumption beyond the limits of the State, without first having it inspected.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN,
Judge.

REVERSED.

The State ex rel. Spencer v. White.

J. D. Johnson and Woodson & Crosby for appellant.

Dunlap & Freeman, Wm. E. Sherwood and F. C. Farr for respondent.

HOUGH, J.—The defendant was convicted in the Buchanan circuit court of violating the provisions of section 5843 of the Revised Statutes regulating the inspection of petroleum. The information upon which he was tried contained three counts, and he was found guilty under the first count. The charging part of that count is as follows: "That one George M. White, at the city of St. Joseph, in the county of Buchanan, did sell to C. D. Smith & Co., a firm composed of Chas. D. Smith, Abram Nave, James McCord and Sam'l M. Nave, on the 15th day of August, 1881, three barrels of petroleum oil or kerosene, for consumption for illuminating purposes within this State, namely, the State of Missouri, before first having the same inspected, branded or gauged." The portions of section 5843 material to the present inquiry, are as follows: "If any person shall sell to any other person whatever, any of said oils or fluids for consumption for illuminating purposes within this State, before first having the same inspected as aforesaid * * * (he) shall be deemed guilty of a misdemeanor and upon conviction thereof punished by a fine not exceeding \$300, and by imprisonment in the county jail for thirty days." It was agreed at the trial that the defendant "did sell petroleum oil at the city of St. Joseph, Buchanan county, Missouri, as charged in the information, and to the parties therein named, for consumption for illuminating purposes in the states of Kansas and Nebraska, without having the same inspected; that all the oils thus sold were not only sold to be consumed in the states of Kansas and Nebraska, but were, under the superintendence of defendant, shipped by him in the name of the parties named in the affidavit and information, to

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the states of Kansas and Nebraska, for consumption for illuminating purposes. It will be seen that the information charges the defendant with selling uninspected oil in this State for consumption for illuminating purposes within this State. The defendant admits that he sold oil for illuminating purposes without having the same inspected, but says that it was sold for consumption in the states of Kansas and Nebraska.

It is contended for the State that a sale of uninspected illuminating oil is a misdemeanor under the statute, whether it be sold for consumption within this State, or within any other state or country; that the gist of the offense is the sale of the oil without inspection, regardless of the locality in which it is to be consumed. On the other hand it is contended by the defendant that it is only when uninspected oil is sold for consumption within this State that any offense is committed, and that on the agreed state of facts, he was, therefore, improperly convicted.

The first section of the act in question, being section 5838, Revised Statutes, provides that: "The Governor shall appoint for each of the cities of St. Louis, Hannibal, St. Joseph and Kansas City, and for such other cities and towns as shall, by the authorities thereof, petition to him therefor, an inspector of petroleum oils, kerosene, gasoline or any product of petroleum by whatever name known, which may be manufactured, offered for sale or sold for consumption for illuminating purposes within this State. Each inspector shall be a resident of the city or town for which he is appointed," etc. Section 5839 provides the manner of testing the oil, and makes it the duty of the inspector, when called upon for that purpose by any owner, manufacturer or dealer in any of the oils specified in the preceding section, to promptly inspect, gauge and brand the same, "within the city or town for which he is appointed." Section 5840 relates to brands for inspected oils. Section 5841 provides that none of the oils named, which, under the prescribed test, will ignite at any tem-

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perature less than 150° Fahrenheit, "shall be offered for sale, sold or used for illuminating purposes within this State"—and makes it a misdemeanor to use any such oil. Section 5842 is unimportant. Section 5843 is the section under which the defendant was indicted and has already been quoted. Section 5844 is unimportant. Section 5845 provides that: "Any inspector having information or reason to believe, that any person, within the city or town for which he is appointed, has sold or is offering for sale, for consumption for illuminating purposes within this State, or is using for said purpose any of the oils specified, etc., shall require such person to submit said oils for his inspection." The remaining sections are unimportant.

We deem it unnecessary to make any special statement or examination of the arguments of counsel, based upon the rules of syntax and canons of construction invoked by them respectively, as a plain, simple and natural interpretation of the language of the statute will, we think, enable us to arrive at its true intent and meaning. In construing this law it must be borne in mind that no inspector has any authority whatever to inspect any oils outside of the city for which he is appointed. The argument, therefore, that the words "within the State," in section 5838, qualify the words "manufactured," "offered for sale" or "sold," must necessarily fall to the ground. The true meaning of that section is this, that an inspector shall be appointed for each of the cities named, of petroleum oils and all products thereof, manufactured in said cities, offered for sale in said cities, or sold in said cities for consumption for illuminating purposes within the State. This construction, which is manifestly the correct one, is supported by the language of section 5845. By that section, as has been seen, when any person has sold or offered for sale in any city or town having an inspector (which is necessarily within this State) for consumption for illuminating purposes within this State, any of the oils specified in section 5838, which have not been inspected, it is made the duty of the inspector to

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inspect them. There can be no question but that the words "within this State," in this section, qualify the word "consumption." As the language employed in section 5841, is perhaps susceptible of a double construction, that construction must be given to it which will make it harmonize with sections 5838, 5843 and 5845, which are unambiguous. The judgment of the circuit court will be reversed and the defendant discharged. All concur, except HENRY, J., who dissents.

LACY V. BARRETT, *Appellant*.

1. **Special Judge:** PROCEEDINGS FOR HIS ELECTION. Under the statute in relation to the election of a special judge in cases where the regular judge is disqualified to sit, (and in certain other cases,) from the time that the disqualification is ascertained all the judicial powers of the regular judge cease so far as that case is concerned. The statute imposes upon the clerk the duty of holding the election, and the judge has no power to make any order in respect thereto. Hence, where the person elected was known to the judge to have been of counsel in the case, and for this reason he set aside the election and caused a new one to be held; *Held*, that this was error.
2. ———: ———. It is for the parties to a cause, and not the judge, to object to a person elected special judge on the ground of disqualification; and when the objection is made it must be to the clerk. The duty of holding a new election rests upon him.
3. ———: PRACTICE. Where a case tried before a special judge, on account of disqualification of the regular judge, is remanded for a new trial, if the regular judge has been succeeded in office by one who is not disqualified, the new trial will be had before him as if no special judge had ever been elected.

Appeal from Lewis Circuit Court.—The case was tried before GEORGE ELLISON, Esq., sitting as Special Judge.

REVERSED.

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N. Rollins for appellant.

HENRY, J.—This was a proceeding by *scire facias*, in the circuit court of Lewis county, to revive a judgment rendered by that court in favor of plaintiff against defendant, on the 15th day of September, 1868. At the March term, 1879, of said court, it appearing that Jno. C. Anderson, judge of the Lewis circuit court, had been an attorney in the cause, and the attorneys for the respective parties being unable to agree upon a member of the bar to sit as special judge to try it, the court made an order of record for an election by the bar of a special judge, whereupon an election was held, which resulted in the choice of Jas. G. Blair, a member of that bar, as such special judge. Judge Anderson thereupon stated that Mr. Blair had been an attorney in the cause, and was, therefore, disqualified to act as special judge, and of his own motion, declared the election void, and directed another to be held. To this defendant objected. Another election was then held and George Ellison, Esq., was selected, and thereupon defendant filed his motion to suspend all further proceedings in the cause, and restore it to the place upon the docket which it occupied and the condition in which it stood before the order for the election of a special judge was made, on the ground that Mr. Blair was duly elected, and had not declined to serve, or been objected to by either party, and that Ellison was not duly elected; said motion was overruled. The cause was then tried before Mr. Ellison as special judge, and resulted in a judgment in favor of plaintiff reviving said judgment. The defendant filed his motion in arrest, alleging that the special judge who tried the cause had no jurisdiction, not having been legally elected as such special judge. This motion was overruled, and defendant has brought the cause here by appeal.

The statement of the case indicates the only question presented for determination. By the act of the general

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assembly of March 19th, 1877, it was provided that: "Whenever the judge, from any cause, shall be unable to hold any term, or part of term of court, and shall fail to procure another judge to hold said term or part of term, or if the judge is interested, or related to, or shall have been counsel for either party, or when the judge, if in attendance, for any reason cannot properly preside in any cause or causes pending in such court, and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court for the trial of such cause or causes, the attorneys of the court who are present, but not less in number than five, may elect one of its members then in attendance, having the qualification of a circuit judge, to hold the court for the occasion." Section 3 provides that: "The election shall be held by the clerk of the court, who shall, in case of a tie, cast the deciding vote." By section 4, if the person first elected to act as special judge fails or refuses to act, or cannot properly preside, another election shall be held in like manner as provided in the next preceding section, from time to time, until a suitable person is chosen who can and will preside. By the 5th section it is provided that: "The person thus selected shall, during the period he shall act, have all the powers and be liable to all the responsibilities of the circuit judge." These are all the provisions of the statute which throw any light on the question here involved.

Judge Anderson, it seems, did not wait for an objection to his presiding at the trial of the cause, but, when it was called, announced his disqualification, and made the order for the election of a special judge. There is no provision of the law requiring any such order, but when the disqualification of the judge is ascertained by his own admission or otherwise, by the terms of the act, the members of the bar may at once, without any order of court, elect a special judge for the trial of the cause. When, therefore, he announced his disqualification, and the clerk held

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the election as required by the statute, Judge Anderson, as to that proceeding, and the cause which a special judge was to be elected to try, was no longer the judge of that court. When he announced his disqualification to preside at the trial, he abdicated his office, as to that cause, and had no more authority to direct and control the election, or correct any errors which might occur in its progress than any other member of the bar, or citizen of the county.

If Mr. Blair had been of counsel, in the cause, and either party had, for that reason, been unwilling that he should preside at the trial, the objection should have been made to the clerk, whose duty it was to hold the election, and, under section 4, another election could have been held, and so, from time to time, until a suitable person was chosen who could and would have presided. If the circuit judge could set aside the election, or in any manner control it, the result would be that he could set aside one election after another, until the bar selected the man of his choice. The law gives him no vote in such election, but, under his construction of its provisions, a power more than equal to all the votes of the bar. We do not presume that any circuit judge, certainly are not to be understood as intimating that Judge Anderson would have so abused a power clearly conferred, much less be influenced by improper motives in the exercise of one of doubtful existence. Was he to determine whether Mr. Blair had been of counsel or was otherwise disqualified? He could not so determine as judge, because, as to the cause, and that election, he was not a judge. And even if Mr. Blair had been of counsel, the parties might, in the first instance, have agreed that he should preside at the trial of the cause, and after his election could have waived the objection, as they might have done in the case of Judge Anderson himself. It was for them, and not the judge, to raise the question. If the party against whom Mr. Blair had been of counsel, did not learn that fact until after he had been elected and qualified,

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he could then have raised the objection, and, if the fact so appeared, another election could have been held.

For the foregoing reasons, the judgment is reversed and the cause remanded, and the present judge of the circuit court of Lewis county, the successor of Judge Anderson, will preside at the trial, as if no special judge had ever been elected. SHERWOOD, C. J., and HOUGH, J., concur. NORTON and RAY, JJ., dissent.

THE STATE *ex rel.* MOUNT V. BOURN *et al.*, Appellants.

1. **Road Expenditures.** If a road overseer exceeds, in his expenditures on the roads in his district, the amount provided by the county court for road purposes, he cannot recover the excess from the county.
2. ——— : **OVERSEER'S PER DIEM.** Where the road taxes are paid wholly in work or so nearly that there is not money enough in the district fund to pay the overseer's per diem compensation, he will be entitled to have the deficiency made good to him out of the county treasury.

Appeal from Scotland Circuit Court.—HON. J. C. ANDERSON,
Judge.

REVERSED.

This was a proceeding by mandamus against Benjamin F. Bourn, Ellis Sparks and Riley Gale, justices of the county court of Scotland county, to compel them to issue the relator a warrant on the county revenue fund for \$17.50 due relator for labor performed by him as road overseer and for sign-boards and materials furnished to his district. The county court had allowed the claim and ordered the clerk to issue to relator a script on his district for the amount. This relator refused to receive, and the county

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court refused to issue a warrant on the county treasury. Other facts appear in the opinion.

Cramer & Myers for appellants.

SHERWOOD, C. J.—The return of the county court justices, which the demurrer thereto admits to be true, sets forth that they, “as justices of the county court, made an order of record setting apart a certain portion of the county revenue for the purpose of repairing roads, purchasing material and tools for district No. 4, township 65, range 12, Scotland county, and that the amount so set apart was ample and sufficient for the purpose; that the court in its order had fixed the price of labor in said district and the amount of tax to be collected.”

This return, we think, was good and sufficient and should have been thus held. And if, as the county justices say in their return, the relator exceeded the amount of said labor and taxes so provided by the county court, it was without any authority. It belongs to the county court, and the county court alone, to say, within the limits the statute prescribes, the number of days each person liable to work on public roads shall work, and the amount of road tax to be levied. Sess. Acts 1877, pp. 397, 398, §§ 16, 17, 20. If the road overseer exceeds, in his expenditures on the roads in his district, the amount provided by the county court, it is a matter of his own concern. To permit him to exceed the amount provided by the county court for him to expend, would be to substitute his judgment for that of the county court and to nullify the statute. This is a thing we will not sanction. In the case of *Ewell v. Virgil Township*, 65 Mo. 657, we ruled a similar point in the same way.

If the claim of relator had been for his *per diem* as road overseer, and the taxes in his road district had “been paid or so nearly paid in work,” that there was not “sufficient funds of the road district

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2. ———: overseer's per diem.

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to pay the overseer the compensation allowed him, then the county court under the provision of section 16, *supra*, could have caused the deficiency of his compensation to have been paid out of the county treasury." We shall reverse the judgment and remand the cause, and if, upon its return to the court from whence it came, it shall appear that any portion of the claim of relator is for his personal services as road overseer, then the court below to that extent may proceed as herein indicated. All concur.

SWIGERT V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

1. **Railroads:** STOPPING AND STARTING OF PASSENGER TRAINS. The rules laid down in *Straus v. R. R. Co.*, *ante*, p. 183, affirmed.
2. **Instructions** offered by the parties but amended by the court before being given, are to be considered as if given by the court of its own motion, and the fact that counsel read them to the jury will not operate a waiver of exceptions duly taken to the action of the court.
3. **Contributory Negligence.** Instructions so drawn as to put upon the plaintiff the onus of showing that he was not guilty of contributory negligence are properly refused.
4. ———: DEFENDANT'S LIABILITY. The negligent acts of a defendant which will subject him to liability notwithstanding the contributory negligence of the plaintiff are such as are committed after he becomes aware of the danger to which plaintiff has exposed himself.
5. ———: BOARDING MOVING TRAIN. It is not necessarily negligence to attempt to get on a train which has started from a station. The rate of speed and whether the train was stopped a sufficient length of time to enable passengers to get on, are circumstances to be considered in deciding the question.
6. ———: ———. The fact that the conductor of a railroad train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the con-

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ductor actually sees him attempting to get on when he gives the order to start.

- 7 **Railroads:** DUTY TO STOP AT STATIONS. Railroad trains are bound to stop at stations a reasonable length of time to enable passengers to get on.

Appeal from Linn Court of Common Pleas.—The case was tried before CHAS. L. DOBSON, Esq., sitting as Special Judge.

REVERSED.

Geo. W. Easley for appellant.

Huston & Brownlee for respondent.

HOUGH, J.—This is an action to recover damages for personal injuries received by the plaintiff in attempting to board one of the defendant's passenger trains. The petition alleges: That the agents and servants of defendant in charge of said train, negligently failed to stop the train at said Bucklin station a reasonable length of time to permit plaintiff to get on said train, and while plaintiff was attempting to get on said train those in charge of said train negligently and carelessly started said train rapidly forward, whereby the plaintiff was struck by the cars of the said train, knocked down and very severely injured, etc. There was testimony tending to show that the train was five hours behind time, and that it did not stop a reasonable length of time to permit the plaintiff to get on, and that the conductor saw the plaintiff attempting to get on, and started the train while he was so in the act of getting on. There was testimony tending to show, also, that the train stopped a reasonable time, that the plaintiff was intoxicated and by his conduct and conversation induced the conductor to believe that he did not intend to take passage on his train, and that while going toward the coach, he fell and was injured.

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For the plaintiff the court gave the following instructions:

1. It was the duty of those in charge of the train to bring it to a full stop at the platform at Bucklin, and to stop there a reasonable length of time to allow passengers to get off and on in safety; and if the jury believe from the evidence that they did not do so, or that they started up at an unusual rate of speed, or with unusual suddenness, and that plaintiff was injured thereby without fault on his part, then they are bound to find for plaintiff.

2. Although the jury should believe from the evidence that plaintiff was intoxicated, and was negligent, yet if they further believe that the conductor of the train could have prevented the injury to plaintiff by exercising ordinary care, prudence and caution after he discovered the danger in which plaintiff was placed, and that he failed to do so, then the verdict should be for plaintiff.

3. Even should the jury believe that the train stopped long enough for plaintiff to have got on if he had started to do so as soon as the train came up, yet if the conductor saw the plaintiff in the act of getting on the car, and while plaintiff was so in the act of getting on the car the conductor gave the signal to go ahead, and the train was suddenly started before plaintiff could get into the car, and plaintiff was thereby knocked down and hurt, then the finding should be for plaintiff.

4. If the jury find for plaintiff, they should allow him for all his loss of time and medical expenses occasioned by his injury, and should also take into consideration and allow him for his physical sufferings, and his diminished ability to labor, caused by the injury, both present and future.

The defendant asked the following instructions:

1. Unless plaintiff has shown by the preponderance of the evidence in his favor, and to the satisfaction of the jury, that he was injured by defendant's train by reason of the negligence and want of care of defendant's employees

in charge of said train, and that plaintiff was guilty of no negligence which contributed directly to said injury, the verdict of the jury must be for defendant.

2. If the jury believe from the evidence that the train stopped at Bucklin station long enough to enable plaintiff to get safely on if he had availed himself of the time when the train was stopped, and had not been disabled by intoxication, then the jury must find for defendant.

3. If the jury believe from the evidence that plaintiff was guilty of negligence in attempting to get on the train, and that such negligence contributed directly to the injury sustained by plaintiff, he cannot recover, although the jury may further believe that defendant's employes in charge of said train, were to some extent negligent in starting said train.

4. If the jury believe from the evidence that the train stopped at Bucklin station, and after it had started plaintiff attempted to get on the step of the car, and in attempting to do so fell and got injured, then such act on his part constituted negligence, and the verdict should be for defendant.

5. If the jury believe from the evidence that the train stopped at Bucklin station a sufficient length of time to enable a man using ordinary diligence to get on the train with safety, then the verdict must be for defendant.

6. If the jury find from the evidence that both plaintiff and defendant by their negligence immediately contributed to produce the injury, plaintiff cannot recover, and the verdict must be for defendant.

7. If the jury believe that the actions and talk of plaintiff were sufficient to and did induce the conductor to believe that plaintiff did not intend going upon his train, then defendant is not to be charged with negligence by reason of said conductor having started it, without regard to the length of time said train may have been stopped or when it started.

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8. If the jury believe from the evidence that the conductor in charge of the train did not know that plaintiff was about to get on his train, then negligence cannot be imputed to defendant, and the verdict should be for defendant.

9. If the jury believe from the evidence that plaintiff, while on the platform at the depot, and while going toward the car, and without fault or negligence of defendant's agents, with the intention of taking passage thereon, tripped and fell toward and against the car, and by reason of so falling, received all the injuries complained of, then he cannot recover, and the verdict must be for defendant.

10. Plaintiff was guilty of negligence under the circumstances in proof in attempting to board the train at the time he so attempted, and the jury must, therefore, find their verdict for defendant.

The court gave the second and third, and refused the remainder.

The court then gave the first instruction after adding thereto the words, "Unless the jury shall further believe that such injury might have been avoided by the use of ordinary care and prudence on the part of defendant's agents and servants;" and also gave the fourth after adding thereto the words, "Unless such injury might have been prevented by the use of ordinary care and prudence on the part of defendant's agents, or any of them." The court also gave, of its own motion, the following instruction: "If the jury believe from the evidence that plaintiff, while on the platform at the depot, and while going toward the cars with the intention of taking passage thereon, tripped and fell toward and against the car, and by reason of so falling, and without fault or negligence on the part of defendant's agents or servants, received the injuries complained of, then he cannot recover, and the finding should be for defendant." There was a verdict and judgment for plaintiff, and the defendant has appealed.

The word "and" should be substituted for the word

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"or" where the latter word first occurs in the first instruction given for the plaintiff, in order to make the instruction conform to the charge of negligence contained in the petition. With this exception we perceive no error in the instructions given for the plaintiff. They are in harmony with the rules applicable to cases of this kind, announced in the case of *Straus v. R. R. Co.*, ante, p. 185.

As it appears from the record that the defendant excepted to the refusal of instructions numbered one and four as asked by it, and also excepted to the amendment of said instructions, made by the court, we must regard these instructions as amended, as having been given by the court of its own motion. The fact that the defendant excepted to the amendments made, shows that it did not accept them, although its counsel may have read them to the jury.

The first instruction asked by the defendant was properly refused for two reasons. It was inapplicable to the facts of the case. On the testimony adduced, the jury might have found that the plaintiff was entitled to recover notwithstanding he had been guilty of contributory negligence. In the second place it improperly placed upon the plaintiff the *onus* of showing not only that he had been injured by the negligence of the defendant, but also that he himself had not been guilty of contributory negligence. *Buesching v. Gaslight Co.*, 73 Mo. 229.

Nor should this instruction have been given as modified by the court. The modification did not correct the errors we have pointed out; and besides it was in itself erroneous. It should have restricted the liability of the defendant to negligent acts committed by its servants after they became aware of the danger to which plaintiff's negligence had exposed him. *Nelson v. R. R. Co.*, 68 Mo. 593.

As this case must be retried, it will be proper to observe that the defendant's second instruction should not

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have been given, for the reason that it is in direct conflict with the third instruction given for the plaintiff.

Defendant's third instruction directs a verdict for it, although its servants may have negligently started the train after becoming aware of the plaintiff's negligence. This instruction should not be given when the case is retried, without some modification.

Defendant's fourth instruction erroneously declares the effort of the plaintiff to get on the train while in motion to be negligence *per se*, without regard to the speed of the train, or the fact that it may not have been stopped a sufficient length of time to enable the plaintiff to get on before it was again started, and it is, therefore, unnecessary to notice the modification of this instruction made by the court.

Defendant's fifth instruction was properly refused. It is in conflict with the third given for the plaintiff.

The sixth is too general and is not applicable to the facts in evidence. It directs a verdict for the defendant even though it may have been guilty of negligence after becoming aware of the plaintiff's negligence.

The seventh is erroneous and inconclusive, and was properly refused. It ignores the fact that the conductor, notwithstanding the conduct and conversation of the plaintiff, may have seen him attempting to get on the train when he started it.

The eighth was properly refused. It ignores the duty of the defendant to stop its train a reasonable time. Even though the conductor may not have known that the plaintiff was in the act of getting on the train when he started it, yet if he so started it without allowing a reasonable length of time for the plaintiff to get on, he was guilty of negligence.

The ninth was given by the court of its own motion in paraphrase.

The tenth is erroneous, and was properly refused. Whether the plaintiff was guilty of negligence in attempt-

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ing to get on the train was a question of fact for the jury, inasmuch as the testimony was conflicting in regard to that matter. For reasons heretofore stated, the judgment will be reversed and the cause remanded. The other judges concur.

THE STATE *ex rel.* LONGDON, *Plaintiff in Error*, v. SHELBY.

1. **Action on Administrator's Bond:** PRACTICE. Where a party aggrieved by the acts of an administrator sues upon his bond in his own name, it is proper for the court to permit him to correct the error by substituting the State as nominal plaintiff.
2. **To sustain an action on an administrator's bond for non-payment of a demand allowed against the estate,** it is not necessary to show an order of payment by the probate court. It is enough to show assets sufficient in the hands of the administrator and refusal to pay.
3. ———: JURISDICTION. The circuit and not the probate court has jurisdiction of actions on administrators' bonds.
4. ———: PROPER PARTY. Where a demand had been allowed against an estate and in favor of a trustee for several persons, and afterward two of these persons assigned their interests, *Held*, that the assignee became the real party in interest, and an action against the administrator on his bond for non-payment of the assigned demand was properly brought in the name of the State upon his relation and to his use.

Error to Lafayette Circuit Court.—HON. WILLIAM T. WOOD,
Judge.

REVERSED.

This was an action on an administrator's bond. The petition as originally drawn was in the name of John G. Longdon as plaintiff. By leave of court the petition was amended by substituting as plaintiff "the State of Missouri upon the relation and to the use of John G. Long-

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don." The petition as amended alleged in substance the execution of a bond in the usual form by the defendant Thomas G. Shelby, as administrator of Wm. Shelby, and by the other defendants as his sureties; that there came into the hands of said administrator assets of said estate of the value of \$5,192.82; that the total amount of debts allowed against said estate was \$5,192.82, including a debt of \$3,592.32 allowed in favor of George Gordon, trustee under the will of Nancy Shelby, deceased, for Elizabeth, Joseph and E. Lafant Shelby, children of said Nancy; that Elizabeth and E. Lafant Shelby, being each entitled to one-third of the foregoing allowance, had assigned their interests to Longdon; that the administrator had failed to keep and perform the conditions of his bond in this, that although he had in his hands assets ample to pay off and discharge in full the allowances against said estate, yet he refused to pay the demand which had been so acquired by said Longdon; that Thomas Shelby, afterward, desiring to resign his trust as administrator, presented his accounts and asked to be allowed to make settlement of them and to be discharged upon paying said Longdon eight per cent of his said demand; that the probate court rejected this application and that no appeal was ever taken from this decision of the probate court, so that it became conclusive and binding upon defendants; and that all other creditors of said estate had received the amounts due them, and that plaintiff's was the only claim that the said administrator refused to settle. To this petition there was a demurrer, alleging (1) that it was not an amended petition but a statement of an entirely different cause of action from that stated in the original petition, because in the original Longdon was plaintiff, and in the amended petition the State of Missouri was plaintiff; (2) that the probate and not the circuit court had jurisdiction of the action; (3) that it failed to show any order of the probate court requiring the administrator to pay Longdon's claim, or to make distribution of the assets; (4) that the suit should have been

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instituted at the relation and to the use of Gordon, the trustee for the persons through whom Longdon claimed title and in whose name the allowance was made. This demurrer was sustained and final judgment was entered for defendants.

Alex. Graves for plaintiff in error.

Burden & Son and *Rathbun & Shewalter* for defendant in error.

I.

SHERWOOD, C. J.—The amendment to the petition, in the caption thereof, by substituting the words "State upon relation and to use of Jno. Longdon, plaintiff," instead of "John Longdon, plaintiff," was properly admitted. *Wellman v. Dismukes*, 42 Mo. 104; *State v. Sandusky*, 46 Mo. 377; R. S. 1879, § 3567, and cases cited.

II.

Under the ruling of this court in *State v. Modrell*, 15 Mo. 421, there was no necessity for an order of the probate court for the payment of Longdon's demand, as a condition precedent to bringing suit on the bond. It was sufficient to show assets ample in his hands to pay the claim and that he had refused to do so. And this was especially the case, when in addition thereto, the petition also alleged that the claim of Longdon was the only one yet remaining unpaid.

III.

The second ground of the demurrer was equally valueless. The circuit court had jurisdiction. The probate court had none. This was a suit against "living men," and not a demand against the estate of a decedent. Therefore, the case of *State v. Maulsby*, 53 Mo. 500, applies, and, therefore, also, that of *Dodson v. Scroggs*, 47 Mo. 285, does not apply. *State v. Stafford*, 73 Mo. 658.

IV.

Longdon was the real party in interest; the claim had been assigned to him; and the suit was properly brought in the name of the State and upon his relation. We reverse the judgment and remand the cause. All concur.

BELL et al., Plaintiffs in Error, v. SIMPSON.

1. **Promissory Notes:** CONSIDERATION. C. being indebted to plaintiffs upon a purchase of goods, transferred the goods to K. as part of the price of land purchased of K. C. afterward re-sold the land to K. and received as part of the price, the note of K. for \$1,000. He then transferred this note to S. as part of the price of another tract of land bought of S., and secured this note, with others for the remainder of the purchase money, by a deed of trust upon this land. Plaintiffs threatened proceedings in bankruptcy against C., to prevent which he and K. induced S. to indorse without recourse the \$1,000 note to plaintiffs, and to place the same in escrow with a third party, to be delivered to plaintiffs in satisfaction of C.'s indebtedness, upon the execution and delivery to S. by C. of a deed of trust upon said tract of land securing a like amount, which C. then promised to do, and afterward did. *Held*, that this promise and the abandonment of the threatened proceedings in bankruptcy were sufficient consideration for the indorsement to plaintiffs by S. of the \$1,000 note.
2. —: DEED OF TRUST. The indorsement without recourse of a note secured by deed of trust, carries with it the trust deed as a security.

Error to Carroll Circuit Court.—HON. E. J. BROADBUSH,
Judge.

REVERSED.

Marshall & Barclay for plaintiffs in error.

The settlement was a benefit to Chinn by discharging

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his debt to plaintiffs; and a contemporaneous benefit to a third person, based on the promise of another, is a valid consideration for the promise of that other. *Cress v. Blodgett*, 64 Mo. 449; *Rogers v. Gosnell*, 51 Mo. 466. Forbearance of legal proceedings against a debtor is a sufficient consideration for a promise by a third party to become surety or to do anything else in respect to the matter. *Russell v. Babcock*, 14 Me. 138; *Vinal v. Richardson*, 13 Allen 521; *Read v. French*, 28 N. Y. 285. The consideration for a contract need not appear on its face, but may be proved *aliunde*, or inferred from the terms of the agreement. *Arms v. Ashley*, 4 Pick. 71. Plaintiffs were not strangers to the consideration; the contract was made for their benefit. *Flanagan v. Hutchinson*, 47 Mo. 237; *Meyer v. Lowell*, 44 Mo. 328; *Fitzgerald v. Barker*, 70 Mo. 685. The assignment of a note, secured by a deed of trust, carries with it the security, as an incident. *Mitchell v. Ladew*, 36 Mo. 526; *Watson v. Hawkins*, 60 Mo. 550. The transfer of a note secured by the vendor's equity only has the same effect. *Adams v. Cowherd*, 30 Mo. 458; *Sloan v. Campbell*, 71 Mo. 387; *Bailey v. Smock*, 61 Mo. 213. An indorsement without recourse merely excludes the liability as indorser, nothing more. *Daniel Neg. Insts.*, (2 Ed.) § 727; *Ticonic Bank v. Smiley*, 27 Me. 225; *Calhoun v. Albin*, 48 Mo. 304.

Shewalter & Mirick for defendant in error.

The alleged agreement has no elements of fairness or equity in it. It is an attempt simply to appropriate Simpson's property to the payment of Chinn's debt. *Linville v. Savage*, 58 Mo. 248; 1 Story Eq., (5 Ed.) §§ 188, 161. The agreement was purely voluntary on the part of Simpson. The bankrupt proceeding could not affect him in any event. His right to collect the purchase money for the land sold was not dependent upon the bankruptcy proceedings. Chinn's agreement to give a lien upon real estate was in law an agreement to give it upon unincumbered property,

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and the tender of a deed of trust upon property otherwise incumbered was not a compliance with the agreement; and his agreement could have no effect until executed. *Ayres v. Milroy*, 53 Mo. 516. A court of equity will not decree the enforcement of an executory contract, if it appears to be inequitable, unjust or oppressive. 2 Story Eq., § 769; *Taylor v. Williams*, 45 Mo. 83.

HOUGH, J.—One J. F. Chinn, a merchant, being indebted to the plaintiffs for goods sold by them to him, in the sum of \$1,000, sold his entire stock of goods in September, 1873, to one Wm. M. Kendrick, for forty acres of land, valued at \$1,200, and about \$600 in cash. On the 16th day of September, 1873, Chinn re-sold the same land to said Kendrick, and took in payment therefor Kendrick's note for \$1,000, payable in twelve months from said date, with ten per cent interest from date. Chinn thereupon purchased from the defendant Simpson eighty acres of land estimated by some of the witnesses to be worth about \$2,000, for which he paid some cash, and executed his two promissory notes each for \$300, dated September 16th, 1873, one payable on or before March, 1875, and one payable on or before March, 1876, with interest, and also transferred to him the Kendrick note for \$1,000, above mentioned, all of which notes were secured by a deed of trust on the land purchased, executed by Chinn and wife to the defendant Winfrey as trustee. The plaintiffs threatened Chinn with proceedings in bankruptcy, and he and Kendrick being desirous that their trade should not be disturbed, notified Simpson of the apprehended trouble, and they and an agent of the plaintiffs went together to the office of Hale & Eads, attorneys in Carrollton, on the 24th day of December, 1873, to confer with each other. Mr. Hale testified that there were then present, Mr. Rathell, agent for Henry Bell & Son, (the plaintiffs,) Mr. Kendrick, the maker of the note in question, Mr. Chinn, the grantor in the deed of trust, and Mr. Simpson, the bene-

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fiary therein. These parties talked some two or three hours over their respective interests and at last mutually agreed that "Simpson should assign without recourse the said thousand dollar Kendrick note to the plaintiffs, Henry Bell & Son, in payment of their \$1,000 debt against said Chinn, and deposit the same with Hale & Eads to be by us delivered to plaintiffs whenever the said Chinn should execute to said Simpson a deed of trust on the eighty acres of land, sold by Simpson to Chinn, for \$1,000, with ten per cent interest per annum from September 16th, 1873. In execution of that agreement, the said defendant Simpson, thereupon assigned without recourse, by written indorsement thereon, the said \$1,000 Kendrick note, and deposited the same with us, (*i. e.*, Hale & Eads,) to be by us delivered to Henry Bell & Son whenever said Chinn should comply with said agreement; and thereupon, with the knowledge and consent of all the parties to said transaction, we executed and delivered to Simpson the receipt or written indorsement."

The instrument referred to is as follows:

"Hardin Simpson has this day left with us a \$1,000 note, executed by Wm. M. Kendrick to James F. Chinn, which has been assigned to him; said note is assigned by him without recourse, and is to be delivered by us to Henry Bell & Son, whenever said Chinn executes to said Simpson a deed of trust on the eighty acres of land, sold by him to Chinn, for \$1,000, with ten per cent interest per annum from September 16th, 1873.

"December 24th, 1873.

"HALE & EADS."

Mr. Hale also testified that during these negotiations leading to the execution of the escrow agreement, he had suggested to Simpson that he had better get an attorney to advise him in the matter, that "he (witness) rather thought that Simpson supposed he was only releasing his claim on Kendrick to Bell, and was to get an unincumbered lien upon said real estate (subject only to his original

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deed of trust) in place of the Kendrick note; but Simpson did not so state, nor was there anything to that effect expressed by any of the parties to said transaction; it was simply a supposition of my own; and that was one of the reasons why I suggested to Simpson that he had better consult his lawyer before making the trade."

The indorsements on the Kendrick note for \$1,000 are as follows: "For value received, I hereby assign the within note to Hardin Simpson

JAMES F. CHINN."

"I assign the within note to Henry Bell & Son without any recourse on me in law or equity. 24th December, 1873.

H. SIMPSON."

It appears from the evidence that on the 30th December, 1873, Chinn and wife executed a deed of trust to the defendant Simpson on the eighty acres of land purchased of him, to secure a note for \$1,027 made by Chinn to Simpson in pursuance of this agreement. Several days after the note and trust deed were delivered to Simpson, he declared that he would not accept the same; that the terms of the agreement had not been complied with, inasmuch as a judgment had been rendered against Chinn on the 22nd day of December, 1873, for \$150, which was a lien on the land, and his agreement with Chinn was for an unincumbered title. The defendant Simpson also testified that it was agreed between Chinn and himself that when the Kendrick note was transferred to the plaintiffs, the land was to be released from the trust as to said note, and as plaintiffs refused to execute a release, he forbade Hale & Eads to deliver the Kendrick note to plaintiffs. Thereupon Hale & Eads declined to surrender the note, deeming it best that the parties interested should settle their rights in court. Kendrick died insolvent soon after the transaction stated. On the 25th day of October, 1875, Winfrey, the trustee, acting solely under the direction of Simpson, and with knowledge of the facts stated, sold the

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land under the trust deed, and Simpson became the purchaser thereof for the sum of \$900, and on November 26th, 1875, sold the same to one Shannon for \$1,200, who in February, 1876, sold the same for \$4,000.

The plaintiffs then instituted this suit to compel the delivery to them of the Kendrick note, asking also that it be adjudged to be paid out of the proceeds of the sale under the trust deed, wrongfully received by Simpson from Winfrey, the trustee, and also for judgment against Winfrey for the sum so wrongfully paid by him to Simpson. The circuit court found for the defendants, and dismissed the bill.

There can be no question as to the sufficiency of the consideration for the indorsement to plaintiffs, by Simpson, of the Kendrick note. The claim of the plaintiffs against Chinn, the abandonment by them of proceedings in bankruptcy against him, which involved the title to the Kendrick note, and the promise of Chinn to give his own note secured by mortgage, constitute beyond all controversy, a sufficient consideration for the transfer of the note. Conceding that the receipt given to Simpson by Messrs. Hale & Eads does not, in itself, constitute a contract on the part of Simpson, we are of opinion from a careful examination of all the evidence, that it correctly represents the contract between the plaintiffs, Chinn and Simpson.

✕ The indorsement by Simpson of the Kendrick note to the plaintiffs, though without recourse, nevertheless carried with it the deed of trust as a security. There is no intimation anywhere in the evidence that there was any agreement on the part of plaintiffs to release the deed of trust so far as the Kendrick note was concerned. Simpson himself might have extinguished the trust deed as to this note before transferring it to the plaintiffs, but he did not do so. By his indorsement he transferred both the note and the deed of trust to the plaintiffs, and Chinn was to make him a second deed of trust on the same land to secure his note for \$1,027. Simpson testified that the land was to be

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conveyed to him by Chinn free from all incumbrances, except the deed of trust in his own favor. This could only have been accomplished, after Simpson's indorsement, by a release from the plaintiffs, or by Chinn taking up the Kendrick note; and there is nothing in the record to lead us even to suppose that either of these things was contemplated by the parties at the time of their agreement. Indeed the character of Simpson's indorsement on the Kendrick note refutes any such supposition, as Simpson thereby stipulated only for exemption from personal liability, and transferred the right to the security afforded by the trust deed; and Chinn was utterly unable to pay his debt or take up the Kendrick note.

It is quite plain, we think, that Simpson was not advised of the judgment which had been rendered against Chinn, and supposed the land was free from all incumbrances save the trust deed made for his benefit, and it very soon became evident that he very imprudently failed to provide in his agreement against such a contingency. Whether the covenants in his trust deed will afford him any protection this record does not advise us. The parties seem to have made their own agreement without the aid of attorneys, and Hale & Eads simply reduced it to writing as they had made it, and became custodians of the Kendrick note as they had agreed. We can but feel that Simpson is to suffer greater loss from this transaction, than would have befallen him, had he taken proper counsel, but we are powerless to relieve him from the consequences of his own neglect and want of prudence. On the other hand, the plaintiffs, relying upon the rights acquired by them, have doubtless foregone other remedies to which they might have resorted.

We are of opinion that the judgment of the circuit court should be reversed, and the cause will be remanded with directions to the circuit court to enter up judgment as prayed. The other judges concur, except Judge RAY, not sitting.

Mayberry v. The Chicago, Rock Island & Pacific Railroad Company.

MAYBERRY V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Appellant*.

Principal and Agent: IMPLIED POWERS OF RAILROAD PHYSICIAN. The fact that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a person injured on the company's road. See *Brown v. M., K. & T. R. R. Co.*, 67 Mo. 122.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

This was an action upon an account, the items of which were as follows :

To boarding and taking care of and furnishing room	
to one — Fleming during injuries . . .	\$25 00
To damage of beds and bed-clothing . . .	20 00
To washing for said Fleming . . .	4 50
To beer for said Fleming . . .	50
To board of nurse for said Fleming . . .	3 50
Total . . .	\$53 50

At the trial the plaintiff introduced evidence tending to prove that Fleming, while in the employ of defendant as a brakeman on one of its trains, received injuries from which he afterward died; that plaintiff at the time kept a boarding house in the town of Trenton, and that Dr. C. L. Webber, who was then in the employ of defendant as physician and surgeon, applied to plaintiff to receive Fleming into his house; and promised that the defendant would pay him for the board and care of Fleming as well as for the board of nurses and other necessary expenses and damages to beds and bedding; that plaintiff, upon such request and promise of said Webber, received and cared for said Fleming until the time of his death, and that the

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services and other items in plaintiff's statement were reasonable and just charges, and due from defendant if it was liable on the contract made by Dr. Webber; that Dr. Webber was authorized by his employment to contract for medicines, bandages and necessary surgical appliances; that Dr. Webber had no direct authority from defendant to contract for either board or medicine for Fleming, but had frequently contracted for medicines for others and defendant had always paid the bill, and that he had never before contracted board bills, and that after the death of Fleming, by the direction of the assistant superintendent, he purchased a coffin and necessary burial clothes, and the assistant superintendent paid the bill. Under the instructions of the court, the jury found a verdict for plaintiff, and there was judgment accordingly.

M. A. Low for appellant.

E. M. Harber for respondent.

SHERWOOD, C. J.—The evidence adduced had no tendency to show authority on the part of Dr. Webber to bind defendant to pay for the boarding and nursing of Fleming, or any other of the items in plaintiff's account. He certainly had no special authority to that effect, and his general authority only extended to contracts for medicines and things of that nature. Therefore, judgment reversed and cause remanded. All concur.

Robinson v. The St. Louis, Kansas City & Northern Railway Company.

ROBINSON *et al.*, Appellants, v. THE ST. LOUIS, KANSAS CITY
& NORTHERN RAILWAY COMPANY.

Contracts: OFFER BY LETTER: ACCEPTANCE. To make a binding contract, the offer and the acceptance must correspond in every particular. If the offer be by letter, the acceptance must be communicated in some way, either actually or constructively, without unreasonable delay. Express notice of acceptance can only be dispensed with when it is apparently not contemplated, and some other act is equally clear and unequivocal.

Appeal from Carroll Circuit Court.—HON. E. J. BROADBUSH,
Judge.

AFFIRMED.

This was a suit to recover an over-charge upon a contract alleged to have been made with defendant for transportation of corn from Hill's Landing, Missouri, to New Orleans, Louisiana.

The facts, as developed at the trial, were substantially as follows: Prior to the 16th day of May, 1876, plaintiff Robinson had had an interview and also correspondence with Bird, general freight agent of the defendant company, in relation to rates of freight on contemplated shipments of corn to be made over defendant's road. On the day named Robinson wrote that he and his associates were about ready to begin shipping, and asking for the very lowest rate through to New Orleans from Carrollton, Eugene City, Norborne, and points on the Missouri river between Waverly and DeWitt. Upon the receipt of this letter Bird made an arrangement with the St. Louis and New Orleans Packet Company for transportation from St. Louis to New Orleans at the rate of $11\frac{1}{4}$ cents per 100 pounds, and on the 18th sent plaintiffs a letter naming $26\frac{1}{4}$ cents per 100 pounds, as the rate from Richmond & Lexington Junction, a point on defendant's road, to New Orleans. This rate was fixed with reference to the agreement with the packet

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company. The letter was received on the 19th or 20th day of May; but was never answered by them. Without further communication with Bird, plaintiffs, on the 29th day of May, commenced shipping corn to New Orleans from Hill's Landing, a point on the Missouri river. The shipments were made by the steamer *Ida Stockton* from Hill's Landing to DeWitt and thence over defendant's road to St. Louis, its terminus. At this time defendant had an arrangement with the steamer *Gate City*, then plying between Waverly and DeWitt, by which defendant was to carry from DeWitt to St. Louis all freights from certain local points for the same rate that the boat charged from such points to DeWitt. There was no direct arrangement between defendant and the *Ida Stockton*, which was running at that time between the same points; but by an arrangement between the captains of the boats, they both delivered freight to the railroad at DeWitt on the same terms. Neither boat was authorized to make through rates for defendant beyond St. Louis. At the time of making the first shipment, Robinson exhibited Bird's letter of the 18th day of May to the clerk of the *Ida Stockton*, and asked for a through bill of lading to New Orleans. Without communicating with Bird, or in any way obtaining the consent of defendant, the clerk issued a through bill at the rate of freight named in Bird's letter, but consigning the corn to the care of the Mississippi Valley Transportation Company at St. Louis, to be by this company transported from St. Louis to New Orleans. Defendant had no arrangement with this company as to rates. The corn was carried by defendant to St. Louis, and was there delivered to the Mississippi Valley Transportation Company, from whom defendant collected fifteen cents per 100 pounds for freight. The Mississippi Valley Transportation Company then completed the carriage to New Orleans; but required the consignees at that place to pay twenty-seven cents per 100 pounds before they would deliver the corn. This the consignees did under protest. The excess of freights upon

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all the shipments amounted to \$1,711.18. This suit was instituted to recover this sum. The circuit court gave judgment for defendant, and plaintiffs appealed.

• *Hale & Eads* for appellants.

No formal acceptance of Bird's terms was necessary by the plaintiffs, further than their offer to ship the grain. A shipper applies to a railroad company for rates of freight from and to given points; the railroad company replies giving its rates of freight, the only acceptance necessary on the part of the shipper is to deliver the freight to the company at the points of shipment named in the correspondence. *Lungstrass v. German Ins. Co.*, 48 Mo. 201. The letters of Robinson to Bird, and Bird's replies must be construed with reference to the previous conversation between them, the situation of the contracting parties and the object and intention of Robinson, which was known to Bird both through conversations and letters. Robinson calls for a through rate from Richmond & Lexington Junction on the line of defendant's road, and points east as far as DeWitt; naming Norborne, Carrollton, Eugene City and landings on the Missouri river reached by defendant's road, through their boats running from DeWitt to landings not above Waverly. Bird replies, giving a through rate to New Orleans from points east of Richmond & Lexington Junction, without making any distinction between river and railroad points. This authorized Robinson to conclude that he meant a through rate from the points named in his letter east of Richmond & Lexington Junction.

Wells H. Blodgett and *George S. Grover* for respondent.

There was no contract between the parties. The rate of freight offered by Bird to the plaintiffs, in his letter of May 18th, was never accepted by them. They asked for a rate from Carrollton, Eugene City and Norborne, all sta-

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tions on the defendant's line, and points on the Missouri river between Waverly and DeWitt to New Orleans. The reply gave them a rate from Richmond & Lexington Junction, a different point on defendant's line from those mentioned in plaintiff's letter. After a delay of nine days, with ample facilities for telegraphic and daily mail communication, and no reply made by them to Bird's letter, they deliver to a carrier by water, having no authority to make contracts over defendant's railroad, at Hill's Landing, a point not previously named by Bird, and not on defendant's line, but on the Missouri river, a lot of corn, under a contract with the first carrier, and not with defendant, for transportation through to New Orleans. The two parties never assented to the same thing at any time, nor were they ever agreed upon the same subject matter, nor did the defendant profit by any of the stipulations of the alleged contract. The testimony shows that plaintiffs themselves selected the carrier between St. Louis and New Orleans, and that they chose one with whom defendant had no contract, whose rates were unknown to it, and over whose actions it had no control, and who collected and retained all the excess above the rate named by the first carrier. *Parsons on Contracts*, (6 Ed.) 475; *Eads v. Carondelet*, 42 Mo. 117; *Bruner v. Wheaton*, 46 Mo. 366; 48 Mo. 207.

SHERWOOD, C. J.—The vital and controlling question in this case is whether there was a contract between the parties. The bills of lading under which the corn was shipped on the *Ida Stockton* from Hill's Landing, a point on the Missouri river, were not signed by the defendant, nor by any one for it. The letter of Bird, general freight agent of defendant, dated May 18th, 1876, gave plaintiffs a rate from Richmond & Lexington Junction, a point on defendant's road, to New Orleans. Nine days went by and no reply was made by plaintiffs to this letter, though abundant opportunities existed, both by telegraph and

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otherwise, whereby plaintiffs could have signified their acceptance or rejection of the offer made by Bird. As no acceptance of Bird's offer took place, the minds of the plaintiffs and of the defendant never met and concurred. "There is no contract, unless the parties thereto assent; and they must assent to the same thing in the same sense." 1 Parsons Contr., 475; *Eads v. Carondelet*, 42 Mo. 113. A binding contract can only occur when the offer made is met by an acceptance which corresponds with the offer made in every particular. There is no contract until acceptance of the offer by the party receiving it, is in some way actually or constructively communicated to the party making the offer. *Hebb's case*, Law Rep., 4 Eq. Cas. 9. And it must be communicated to the other party without unreasonable delay. *Bruner v. Wheaton*, 46 Mo. 366. And "express notice of acceptance can only be dispensed with when apparently not contemplated, and some other act of acceptance is equally clear and unequivocal." *Lungstrass v. German Ins. Co.*, 48 Mo. 201. Tested by these rules we must hold, as did the circuit court, that no contract was made and consummated between the parties, and, therefore, judgment affirmed. All concur, except RAY, J., not sitting.

SHOCKLEY, *Plaintiff in Error*, v. FISHER.

1. **Corporation:** ASSIGNMENT FOR BENEFIT OF CREDITORS. A corporation may make an assignment for the benefit of creditors under the State law. R. S. 1879, § 354.
2. ———: ———. Unpaid balances upon stock subscriptions are corporate assets and are assignable.
3. ———: ———. If such an unpaid balance be properly assigned, it passes to the assignee and he may collect it.
4. **Trustee:** ———. If one of two persons to whom an assignment

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is made for the benefit of creditors refuses to qualify, all the powers of the trust vest in the other, and he may proceed alone to collect the assets.

Error to Cole Circuit Court.—The case was tried before E. L. KING, Esq., sitting as Special Judge.

REVERSED.

The petition alleged in substance that on the 4th day of September, 1876, the Jefferson City Agricultural Works, a manufacturing and business corporation, executed and delivered to P. H. White and A. J. Shockley a deed of general assignment for the benefit of its creditors, conveying to them as assignees all the effects of said company, including its real, personal and mixed property, evidences of debt, unpaid stock subscriptions and choses in action; that White failed and refused to qualify as assignee under said deed; that Shockley duly accepted the assignment and qualified thereunder and was the sole acting assignee; that defendant was a subscriber for fifty shares of the capital stock of said corporation of the par value of \$100 per share, or \$5,000 in the aggregate, on which he had paid \$3,375, leaving \$1,625 unpaid; that the whole of this unpaid balance was needed to pay the debts of the company, and that plaintiff had demanded payment of this balance of defendant in writing, but he had refused; wherefore plaintiff prayed judgment. To this petition there was a demurrer, alleging, (1) that the Jefferson City Agricultural Works, being a corporation, had no power or authority to make an assignment under the State law; (2) that the assignment having been made to White and Shockley jointly, Shockley could not sue alone. This demurrer was sustained, and the plaintiff electing to stand upon his petition, judgment was rendered for defendant and plaintiff appealed.

Chas. A. Winslow for plaintiff in error, as to the first

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ground of demurrer cited Burrill on Assignments, § 64; *Adler v. Manf'g Co.*, 13 Wis. 63; *Hightower v. Thornton*, 8 Ga. 486; *Webster v. Upton*, 91 U. S. 65; *Hatch v. Dana*, 101 U. S. 205; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; Thompson on Stockholders, § 340; *Nathan v. Whitlock*, 9 Paige 152; *Rankine v. Elliott*, 16 N. Y. 377; *Henry v. R. R. Co.*, 17 Ohio 187; *Wilbur v. Stockholders*, 18 Bank Reg. 178. As to the second he cited *Stewart v. Pullis*, 10 Mo. 755; *King v. Donnelly*, 5 Paige 46; *Parsons v. Boyd*, 20 Ala. 112; *Hannah v. Carrington*, 18 Ark. 85; Burrill on Assignments, (3 Ed.) 639, § 6; Perry on Trusts, (2 Ed.) §§ 273, 343; Hill on Trustees, (4 Am. Ed.) 349, 350, and 462 *et seq.*; R. S. 1879, § 3949.

Edwards & Davison for defendant in error.

The assignment was in the nature of a trust. Perry on Trusts, § 585; 2 Story Eq. Jur., (11 Ed.) § 1036. The plaintiff cannot maintain this action in his own name. White was a necessary party. *Ib.*, § 1286. If one of the trustees refused or failed to perform the duties imposed on him, he could have been removed by the proper proceedings, but this did not give the other trustee any power to act without him. *Hatcher v. Winters*, 71 Mo. 30. The instrument executed by said corporation under the assignment had the same effect as a deed of conveyance, and when properly executed and delivered, vested the title to all the property of said corporation in White and Shockley, and the failure of White to qualify and act under the deed did not have the effect of vesting the whole title in Shockley, nor to re-vest it in the grantor. *Tibeau v. Tibeau*, 19 Mo. 78; *Parsons v. Parsons*, 45 Mo. 265; *Alexander v. Hickok*, 34 Mo. 496; *Lawrence v. Lawrence*, 24 Mo. 269.

I.

SHERWOOD, C. J.—It is not true as assumed by the demurrer that “a corporation has no power or authority to

make an assignment under the State law." Section 354, Revised Statutes 1879, permits an assignment to be "made by a debtor to any person in trust for his creditors." Corporations are in law, for civil purposes, deemed persons. This was the rule at common law. 2 Inst., 697, 703, 706. In the construction of statutes they are to be regarded as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. The *U. S. v. Amedy*, 11 Wheat. 392; *Railroad v. Gallahue*, 12 Grat. 655, and cases cited. Section 3124, Revised Statutes 1879, declares that "When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included." So, whether we go by the common law rule, or by the statutory provision just noted, there is no doubt but that section 354 will apply as well to a corporation as to a person. The books speak but one language as to the right of a corporation to make an assignment. Chancellor Kent says: "A corporate body, as well as a private individual, when in failing circumstances, and unable to redeem its paper, may without any statute provision, and upon general principles of equity, assign its property to a trustee in trust to collect its debts," etc. 2 Kent Com., 398 and note. And elsewhere it is said that a corporation may exercise such right "to the same extent and in the same manner as a natural person, unless restricted by its charter or some statutory provision." *De Ruyter v. Trustees*, 3 Barb. Ch. 119; Burrill on Assignments, § 64.

II.

It is equally unquestionable that the unpaid shares are corporate assets, and, therefore, assignable. *Adler v. Brick Manf'g Co.*, 13 Wis. 63; *Webster v. Upton*, 91 U. S. 65;

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III.

And when these unpaid subscriptions are properly assigned, they pass to the assignee; he represents the corporation and the creditors, and is the proper person to sue for and collect the debts and assets. Thompson on Stockholders, § 340; *Nathan v. Whitlock*, 9 Paige 152. If he could not do this, his selection and appointment as assignee would be a nugatory act.

IV.

An assignment for the benefit of creditors is a trust, and the assignee is to be regarded as a trustee. Perry on Trusts, § 585. Now, the rule is well established that if one of several trustees refuses to accept and execute the trust, the whole estate will vest in the others who act, as much so as if the refusing trustee were dead, or never had the trust tendered him. *King v. Donnelly*, 5 Paige 46; Perry on Trusts, § 273; Hill on Trustees, p. 225, *et seq.* Treating the allegation in the petition that "said White failed and refused to qualify as assignee under said deed," as tantamount to an averment of disclaimer on the part of White, we have no doubt that Shockley, the acting assignee, was the only proper party to sue, and that consequently, White, if joined, would have been improperly joined with him.

We have thus examined in brief the grounds of the demurrer, whether general or special, and hold them all groundless, and judgment reversed and cause remanded. All concur.

PEERY *et al.*, Appellants, v. HALL AND RICE.

1. **Ejectment:** EQUITABLE ESTOPPEL. The owner of the legal title to real estate, whose deeds had been duly recorded, was *held* estopped to assert such title against one whom he advised and encouraged to buy such property at sheriff's sale, at which he himself was a bidder, to whom after such purchase he surrendered the possession, and who with his knowledge and approval made valuable improvements thereon, and who so purchased and improved, relying upon the assurance of such owner that, if he did so, he would acquire the superior title and would not be troubled by the assertion of any claim on the part of such owner.
2. ———: ———. The owner of the legal title to real estate, where deeds had been duly recorded, was *held* estopped to assert such title against one who exchanged a house and lot for such real estate with one then in the possession thereof as the apparent owner, who had made valuable improvements thereon with the knowledge and approval of the true owner, from whom the possession had been acquired, and who to facilitate the exchange transferred a deed of trust held by him from such house and lot to such real estate.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS,
Judge.

AFFIRMED.

This was an action of ejectment for a lot in the town of Trenton, brought by Peery, Austin and Tindall against Hall and Rice. The answer consisted of a general denial and a plea of equitable estoppel. The land had been twice sold, first under a deed of trust and afterward under an execution issued upon a judgment in a suit to enforce a mechanic's lien. Plaintiffs derived title under the former sale; defendants under the latter. The deed of trust was executed and recorded after the work, for which the lien was claimed, commenced, but the sale under it took place before the sale under the lien. Pending the suit to enforce the lien the defendant in the suit died, and the suit was revived against his administrator without joining his heirs. The beneficiaries in the deed of trust, who were the plaintiffs

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in this suit, were not made parties, and in this suit claimed not to be bound by the judgment and sale thereunder. Upon this branch of the case the trial court found for them.

In support of the plea of equitable estoppel defendant Hall testified substantially as follows: He was one of the attorneys for the plaintiff in the lien suit. While the property was being advertised for sale under the execution plaintiff Peery, who was an attorney at law, called to see witness in relation to the conflicting claims of the parties. Peery said the question involved was one of law and could be settled without suit, and asked to see any authorities witness had to present in support of his claim; that witness showed him a decision, which Peery read and said it settled the question, adding that as plaintiffs had not been made parties to the lien suit he thought they had a right to redeem, but that the judgment was for more than the land was worth, and they, therefore, would not redeem. Witness offered to sell him the judgment, and he offered \$500 for it, which witness refused. Witness understood from his talk, and thought he so stated, that plaintiffs would abandon all further claim to the property. Peery was acting as attorney for the administrator of the estate of the defendant in the lien suit and was a creditor of that estate to a large amount. After this conversation and about a week before the sale, Peery and witness had another conversation about the sale, plaintiffs' claim to the property and the title that would pass to the purchaser under the sale. Peery's object in this interview was to devise some means to make the property sell for its full value, so as to leave the other property of the estate to pay the other debts. At this time Peery said more than once that the title under this sale would be superior to plaintiffs' title, and that the purchaser could rest assured that plaintiffs would make no further claim, and talked about getting some one to bid in the property. Witness also conversed with Austin about the sale a few days before it

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occurred, and was advised by him to bid, saying that he thought it would be a safe investment, and that witness should buy it in to secure his fee. Austin and Tindall were both present at the sale; Tindall was next to the highest bidder. Witness thought Peery was also present; plaintiffs made no claim at the sale. A few days after the purchase by witness, he had a conversation with Tindall, in which it was agreed that plaintiffs should have the rents up to the 1st day of May, 1874, and witness should have the possession and rents after that date. Witness then told him of his purpose to remodel and improve the property, and of his plan of improvement, and asked his opinion; and he said it was the best thing witness could do. Tindall agreed to notify the tenants that day of the change of ownership, and to pay the rents to witness after the day fixed. That evening he told witness he had given the notice. At this time Tindall said something about plaintiffs' having some claim to the property, and witness again told him of his intention to improve, and said if plaintiffs were going to make any claim, that witness wanted them to do so at once, as witness could not afford to spend more money on the property if plaintiffs were going to give him any trouble. Tindall then told him to go ahead, and plaintiffs would never trouble him. About the time of the purchase, Austin and witness had a talk about making improvements on the property; witness told him of the nature of the improvements and the changes intended to be made, and Austin said he thought it was the best thing witness could do with the property. Witness paid out about \$1,000 on these improvements in 1874, and plaintiffs all knew that they were being made.

Rice owned a house in Trenton which he offered witness for the corner house when completed. Austin had a deed of trust on Rice's house which had to be removed before the trade could be made. Witness saw Austin about transferring his deed of trust to this corner building; told him of the proposed trade and asked his advice about

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it. He said it was a good trade, as the building would suit Rice, and that in order to facilitate the trade, he would transfer his deed of trust as requested. There was also a mortgage to the county on Rice's property which had to be transferred before the trade could be made. The county court requested an abstract of the witness's property and he got Peery to let him have the use of his abstract books for the purpose; told him what he wanted with the books and of the trade; also told Tindall of the proposed trade, and he said it was a good one; plaintiffs all knew of this trade before it was closed. Witness made his improvements in good faith; would not have made them or the purchase if he had known plaintiffs intended to set up any claim to the property.

Upon the plea of estoppel the court found for defendants, and gave judgment accordingly.

Charles A. Winslow for appellants.

George Hall for respondents.

SHERWOOD, C. J.—If the testimony of Hall is worthy of belief, a clear case of estoppel has arisen even in his favor, and although Hall's testimony conflicts with that of the plaintiffs in some respects, yet it finds corroboration in the testimony of the other witnesses and some of the circumstances attending the transaction, and the circuit court having all the witnesses before it, possessed superior facilities for placing a proper estimate upon the force, effect and value of the testimony adduced than we possibly can. Two of the plaintiffs were present at the sale under the lien judgment and bid on the property which Hall bought in. After the sale, they, through Peery their co-plaintiff, surrendered possession of the premises to Hall, and an adjustment of the rents up to the 1st day of May, 1874, took place, and Hall was to collect the same and account to plaintiffs. Thereupon, Hall, thus placed in possession, made valuable improvements on

1. EJECTMENT: equitable estoppel.

the premises, and to all intents was the apparent owner. These facts are undisputed, and, standing alone, are of themselves sufficient to raise an estoppel, regardless of any direct promise or representation to that effect.

“The term ‘representation’ is used for convenience.

* * It is not necessary that there should be an express statement. It is enough that a representation is implied, either from acts, silence or other conduct.” Bigelow on Estoppel, 437. But in this case, if the testimony on the part of defendants is to be taken as true, there were terms and expressions of active encouragement used on the part of plaintiffs—terms wholly inconsistent with any subsequent claim of the property thus surrendered by them.*

But were we inclined to leave the question of estoppel as to Hall an open one, there can be no doubt when we come 2. —: —. to the case of Rice but that he would be protected against any claim of the plaintiffs. When Rice exchanged his home with Hall for the corner building, Hall was in full possession, having been given possession by plaintiffs themselves, and was acting as owner and making improvements, the plaintiffs living in the vicinity, perhaps in the same town, and making no objections, and one of them, Austin, actively aiding in the exchange, and Tindall and Peery, according to Hall, consenting thereto. If these facts do not operate an estoppel, it would be difficult to imagine any that would so operate. The authorities cited by defendant fully support the position here taken, and judgment affirmed. All concur.

*Another case brought by the same plaintiffs against defendant Hall alone was disposed of in the same way. NORTON, J., delivering the opinion of the court, said: The case now before us was tried upon the same evidence introduced on the trial of the above case and involves the same questions as to defendant Hall. It was expressly held in that case that his evidence was sufficient to raise an estoppel in defendant Hall's favor, and this ruling necessarily leads to an affirmance of the judgment in this case.

The State ex rel. Cassidy v. Slavens.

STATE *ex rel.* CASSIDY V. SLAVENS *et al.*, Appellants.

1. **Mandamus** : CITIES: SPECIAL TAX : EXECUTIONS. Under the statute authorizing the courts whenever an execution against a city has been returned unsatisfied for want of property whereon to levy, to issue a writ of *mandamus* to the proper officers of the city to levy, assess and collect a special tax to pay the execution, it is not necessary in an application for the writ to allege a demand upon the officers and their refusal to levy the tax. No formal petition is necessary. It is sufficient to exhibit to the court the execution and the return of *nulla bona* thereon, and then ask for the alternative writ. Wag. Stat., 617, § 77.
2. ——— : CHANGE OF VENUE: COSTS. Upon such an application motions for change of venue and security for costs will not be allowed.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON,
Judge.

AFFIRMED.

The petition filed in the trial court alleged the recovery in that court of a certain judgment by the relator against the City of Kansas, the issuance of an execution and the return by the sheriff of *nulla bona* thereon; that the defendants were the mayor and common council of that city, empowered by its charter to provide by ordinance for the levying and collection of all taxes for city purposes; and prayed that defendants might be commanded to levy a special tax to pay the execution. The court thereupon ordered an alternative writ of *mandamus* to be issued, which was returned "Served by delivering a copy thereof to each of the defendants." Defendants moved the court to quash the writ upon the ground, among others, that no demand to levy any tax had ever been made or refused, and that the petition did not state facts sufficient in law to authorize the court to grant the writ. This motion was overruled. The clerk then filed a motion for security for costs upon the ground that the relator was a non-resident of the State; and, upon that ground also and because relator

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had not filed the written undertaking of any resident of the State for the payment of costs as provided by the statute, defendants filed a motion to dismiss. These motions were, upon relator's motion, stricken from the files. Defendants then filed an application for a change of venue upon the ground of prejudice on the part of the judge, which was overruled. Defendants then filed their return to the alternative writ, and relator's motion to quash the same was sustained. A motion for a new trial having been overruled, defendants bring the case to this court by appeal.

S. P. Twiss for appellants.

M. Campbell for respondent.

SHERWOOD, C. J.—Section 77, 1 Wagner's Statutes, 617, controls this case. That section provides that when-
1 MANDAMUS: cities: special tax: execution. ever an execution issued out of any court of record in this State against any incorporated town or city shall be returned unsatisfied, etc., such court may by writ of mandamus compel the proper officers to levy a special tax to pay such execution and all costs. In our opinion when the remedy provided for by this section is invoked, no formal petition or application for the issuance of an alternative writ is necessary. It would seem to be sufficient to show the execution and the return thereon, and then call for the alternative writ of mandamus. The statute evidently contemplates a summary proceeding in aid of the unsatisfied execution. And there is some significance in the fact that section 77, *supra*, is found under the title of "Execution" as if to show that the mandatory process is more in the nature of an ordinary execution than the usual process designated by the name of mandamus. If no formal pleading were necessary in instances like the present as preliminary to the issuance of the alternative writ, then certainly no demand was necessary to the maintenance and proper prosecution of the present pro-

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ceedings. It is not necessary to rely upon common law authorities in reference to this matter of demand, because the statute is sufficient in and of itself and does not require any adventitious aids.

And we do not regard this as a fit occasion for an application for a change of venue, no more than we would were an application made in term time for the issuance of an execution. All matters in controversy between the parties hereto had been settled by the judgment recovered. And the motion for costs made by the clerk was properly denied. Section 1, page 687, General Statutes 1865, does not apply to a case of this kind. Here the action of the relator had ceased and had become merged in the judgment recovered for her use. The time for such motions had consequently gone by. For these reasons we affirm the judgment. All concur.

 SPARLING, *Appellant*, v. CONWAY.

1. **Malicious Prosecution: PLEADING—GENERAL DENIAL.** In an action for malicious prosecution the defendant, under the general denial, may prove that he acted in good faith upon the advice of competent counsel.
2. ———: **EVIDENCE.** In such an action, defendant will be allowed to show by his own testimony that from his knowledge of the case, and upon the advice of counsel, he really believed that plaintiff was guilty of the crime for which he was prosecuted.
3. ———: **MALICE: PROBABLE CAUSE.** Evidence that a prosecution was begun and carried on in good faith and in consequence of the advice of competent counsel upon all the facts in the prosecutor's knowledge and all which he might by reasonable diligence have learned, is competent to rebut the presumption of malice arising from the want of probable cause; but it does not tend to establish the existence of probable cause, and is not admissible on that ground.

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4. **Instructions.** Error of the trial court in stating in the instructions legal conclusions from facts submitted to the jury, will not entitle the appellant to a reversal if the jury are properly directed what verdict to render in case they find such facts.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Plaintiff's evidence tended to prove that on the 9th day of October, 1876, defendant swore out an information against him in the court of criminal correction in St. Louis county, charging him with grand larceny in stealing certain paints; that he was thereon arrested and committed to the jail of that county; that on the 19th day of October he was tried upon said charge and was acquitted; that defendant had agreed with plaintiff to paint for him the house of one Harney, but being sick could not do so; that the paints were in Harney's house, and Harney would not wait until defendant's recovery, but wanted one Clawson to do the painting; that plaintiff told Clawson defendant's paints were in Harney's house, and to see defendant's wife and obtain her consent to use them, and to pay her the money if defendant died, or replace the paints if defendant lived; that he had employed and paid counsel to defend him against said charge of grand larceny. Defendant's evidence tended to prove that he had not consented to the use of the paints by Clawson or by plaintiff; that he had consulted an attorney, to whom he had communicated all the circumstances of the case, and was advised by him that it was a plain case of grand larceny; and that he had acted in good faith upon such advice, believing defendant guilty.

Marshall & Barclay for appellant.

Seneca N. Taylor for respondent.

HOUGH, J.—This was an action for malicious prosecu-

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tion. The answer was a general denial, and the defense relied upon at the trial was, that the defendant acted in good faith upon the advice of competent counsel. There was a verdict and judgment for the defendant, which was affirmed by the court of appeals.

The plaintiff contends that the defense stated should have been pleaded in order to be made available by the defendant. We are of a different opinion. The testimony offered and received on this subject, was admissible to disprove the allegation of malice, contained in the petition and sought to be established by the plaintiff, and if the defendant had set it forth in his answer, he would only have pleaded his evidence.

The defendant, who was a witness, was asked by his counsel, whether, from what he knew of the case, and upon 2. — : evidence the advice of his counsel, he really believed the plaintiff was guilty of grand larceny; and he answered, that he did. This testimony was objected to on the ground that it was wholly immaterial whether the defendant believed the plaintiff to be guilty of the charge preferred against him or not. We think the evidence was competent. It has recently been decided by this court, in the case of *Van Sickle v. Brown*, 68 Mo. 627, overruling the case of *Hickman v. Griffin*, 6 Mo. 37, that the reasonable and probable cause which will relieve a prosecutor from liability is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man.

The following instruction, given at the instance of the defendant, was objected to by plaintiff: "If the jury believe from the evidence that Conway, before 3. — : malice: probable cause. he began the criminal prosecution against Sparling, consulted in good faith an attorney at law, and communicated to such attorney, in good faith, all the facts within his knowledge, or which he might have learned by reasonable diligence, bearing upon the guilt or inno-

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cence of Sparling of the crime charged; that said consultation and communication was had, and made by Conway in good faith, with a view to the advice of counsel learned in the law; that said attorney, upon such submission of facts, advised Conway that Sparling was liable to a criminal prosecution for grand larceny; and, if the jury further find that said prosecution was begun and carried on by Conway in good faith in consequence of said advice, and not in pursuance of a previous fixed determination to commence said prosecution, then there was probable cause therefor, and the jury will find for defendant."

The following instruction, asked by the plaintiff, was refused: 2. "Defendant cannot shield himself under the advice of counsel unless he shows that he communicated to such counsel all the facts bearing upon the guilt or innocence of the accused which he knew, or by reasonable diligence could have ascertained."

No error was committed by the circuit court in refusing the instruction asked by the plaintiff, inasmuch as it is embodied in the instruction copied, which was given for the defendant, and if that instruction contains no material error, the plaintiff has not been prejudiced.

The instruction given for the defendant is, in all essential particulars, identical with an instruction passed upon in the case of *Sharpe v. Johnston*, (decided February 6th, 1882).^{*} We there held that the legal conclusion resulting from the facts stated in the instruction, and couched in the closing phrase, "then there was probable cause therefor," was inaccurate, and should have been, "then the prosecution was not malicious," as the facts stated, from which the conclusion is drawn, can properly be relied upon only for the purpose of overthrowing any presumption of malice arising from the want of probable cause, and not for the purpose of establishing the existence of probable cause. This is made manifest by the reflection, that not-

^{*}Not furnished the reporter for publication.

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withstanding the prosecutor may have acted in the utmost good faith, upon the well considered advice of competent counsel fully cognizant of all the facts, the legally constituted authorities may have judicially determined that there was no probable cause for the prosecution; and we would thus make the advice of counsel neutralize the judgment of the court.

The true office of the advice of counsel given and acted on, as above stated, is to relieve the prosecutor from
4. INSTRUCTIONS. the imputation of malice. But this inaccuracy is not a sufficient ground for reversing the judgment; since, whether the legal conclusion arising from the facts set forth, be correctly stated or not, the direction of the court is, that if the facts stated be found to exist, the verdict of the jury should be for the defendant. Indeed the instruction would be good if the legal conclusion were entirely omitted. We are all of opinion that the judgment of the court of appeals should be affirmed.

BELCHER V. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Railroad: KILLING LIVE STOCK: ACTION FOR DOUBLE DAMAGES: PLEADING. In an action against a railroad company to recover double damages for the killing of live stock, the statement filed with the justice of the peace alleged that the animals "strayed upon the track of said railroad on or near a farm crossing, at a point in the line of said railroad where said railroad was not fenced and where the crossing and cattle-guards were not made as the law requires; and that defendant so carelessly and negligently ran and managed its cars and locomotive that they ran against and over" the animals, killing them. *Held*, that, as the case was begun before a justice of the peace, these allegations were sufficient to support a recovery.

Appeal from Cass Circuit Court.—HON. NOAH M. GIVAN,
Judge

AFFIRMED.

T. J. Portis and E. A. Andrews for appellant.

Foster P. Wright and N. J. Thompson for respondent.

NORTON, J.—This is an action commenced before a justice of the peace to recover double damages for killing one cow and two sheep by defendant. Plaintiff had judgment before the justice, and, on defendant's appeal to the circuit court of Cass county, again obtained judgment, from which judgment defendant prosecutes an appeal to this court and assigns for error the action of the court in overruling defendant's objection to the introduction of any evidence because of the insufficiency of plaintiff's statement.

The statement, after alleging that defendant was a corporation, etc., contained the following averments, viz: "That plaintiff was the owner of one cow of the value of \$40, and of two sheep of the value of \$7, which cow and sheep, without the fault of plaintiff, strayed upon the track of said railroad, on or near a farm crossing, at a point on the line of said railroad in Big Creek township, Cass county, where said road was not fenced, and where the crossing and cattle-guards were not made as the law requires; that defendant, by its agents and servants, so carelessly and negligently ran and managed its said cars and locomotive, that they ran against and over said cow and sheep, killing the same, to plaintiff's damage in the sum of \$47, wherefore plaintiff asks that the sum of \$47 be doubled, and that he have judgment for \$94, with interest from the time of said killing."

The case of *Edwards v. K. C., St. Jo. & C. B. R. R. Co.*, 74 Mo. 117, is decisive of the question here presented.

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In that case a statement similar to the one in this case was held to be sufficient; and the case of *Sloan v. Mo. Pac. R'y Co.*, 74 Mo. 47, to which we have been cited by counsel as sustaining his objection to the sufficiency of the statement, was distinguished from the case then under consideration. We have held that if in a statement filed before a justice of the peace, the nature of the transaction and the particulars of the demand appear so as to apprise the opposing party what he is called upon to defend, and specific enough to bar another action, that it is sufficient. *Iba v. H. & St. Jo. R. R. Co.*, 45 Mo. 469; *Norton v. H. & St. Jo. R. R. Co.*, 48 Mo. 388; *Razor v. R. R. Co.*, 73 Mo. 471; *Key v. R. R. Co.*, 73 Mo. 475; *Meyer v. McCabe*, 73 Mo. 236. The statement in this case comes up fully to these requirements. Judgment affirmed, in which all concur.*

*In the case of *Cobb v. The Missouri Pacific Railway Company*, submitted at the same term, a judgment for the plaintiff was affirmed on the same grounds.

THE STATE ex rel. DIXON V. GIVAN.

Practice: REMANDING WITH SPECIAL DIRECTIONS: COSTS. When a case has been remanded by this court with directions to the trial court to enter judgment against the plaintiff, his right to dismiss upon payment of costs is at an end; and if he obtains a dismissal in vacation it will be the duty of the trial court to re-instate the case upon the docket and enter the judgment as ordered.

Mandamus.

PEREMPTORY WRIT AWARDED.

This was a proceeding by mandamus against the Hon. N. M. Givan, judge of the circuit court of Cass county, to compel him to re-instate the case of *Atkison v. Dixon*

on the docket of his court, and to proceed therein as previously commanded by this court. The facts appear in the opinion.

A. Henry for relator.

Waldo P. Johnson and *E. J. Smith* for respondent.

SHERWOOD, C. J.—Whatever right in ordinary circumstances a plaintiff might have under the provisions of section 3724, to dismiss his suit in vacation on the payment of all costs, manifestly he would possess no such right in the present instance. That section, comprehensive though it may be, was never designed to enable a plaintiff to evade or balk the mandates of this court. When the case of *Atkison v. Dixon* was here on appeal, (70 Mo. 381.) we regarded the evidence as having amply established the equitable right of Mrs. Dixon to the land; and such right was necessarily contested and drawn in question in that suit of plaintiff to eject her husband; and so we reversed the judgment and ordered one to be entered in accordance with that opinion; but upon suggestion being made that the wife had never been made a party, we so far changed our opinion as to require her first to be made a party before a decree should be entered. This is the effect of the opinion, although the idea intended to be conveyed thereby is somewhat lacking in clearness. If the plaintiff had desired the privilege of re-opening the controversy; if he had new and independent rights to assert against Mrs. Dixon, rights never before litigated, he should by timely application have requested a modification of our opinion and mandate so as to have secured the desired privilege. This is the view we took of such matters in *Chouteau v. Allen*, 74 Mo. 56. But whether plaintiff under our ruling was entitled to a new trial of his cause or not, it was out of his power to obstruct the judgment and mandate of this court by resorting to the device of an attempted dis-

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missal of his suit. This court would be frequently shorn of its lawful and customary authority, if a plaintiff successful in the lower court, and unsuccessful here, could thus defeat our legitimate commands. We, therefore, award a peremptory writ commanding the trial court to re-instate the cause of *Atkison v. Dixon*, and when re-instated to enter a decree in her favor as heretofore ordered. All concur.

SCHOOLING V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

1. **Judgment** for plaintiff reversed because the evidence wholly fails to establish material allegations of the petition.
2. **Railroad**: LIABILITY FOR KILLING OF CATTLE AT DEPOT. A railroad company is not responsible for cattle attracted to a depot by hay loaded on its cars and killed there by a train, provided the cars are not allowed to stand on the track an unreasonable length of time. It would be otherwise if they were attracted by hay scattered on the track in loading, and left there.

Appeal from Sturgeon Court of Common Pleas.—HON. G. H. BURCKHARTT, Judge.

REVERSED.

Wells H. Blodgett for appellant.

F. T. Jarman for respondent.

NORTON, J.—This action was brought to recover the value of a certain cow, alleged to be the property of the plaintiff, and to have been killed by defendant's cars on or about the 26th day of February, 1876, near its depot at its station known as Sturgeon, Boone county.

The cause being tried, plaintiff obtained judgment,

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from which defendant has prosecuted his appeal to this court, and seeks a reversal on the ground that the court erred in refusing to instruct the jury that upon the pleadings and evidence the plaintiff could not recover, and in giving the following instruction for plaintiff: "If the jury believe from the evidence that defendant left hay on the side-track of their road for several days in succession previous to and up to the time of the killing of plaintiff's cow, and that said cow was enticed on said track by said hay, then defendant was guilty of negligence, and they should find for plaintiff."

Plaintiff based his right to recover on the following allegations in the petition: "Plaintiff further states, that while aforesaid defendant was running its cars over said track, and transacting business as a common carrier, under the aforesaid name and style, it did carelessly and negligently run over, cripple and kill one cow, the property of plaintiff, said negligence consisting of the said company leaving hay standing upon the said track belonging to said company for several days in succession, thereby enticing said cow upon said track, thereby being the immediate cause of said cow's death."

We are satisfied from a careful examination of the evidence offered on the trial that it wholly failed to establish the allegation relied upon for a recovery. The evidence tended to show that the cow in question was killed at Sturgeon, a station on defendant's road, at which place defendant received and shipped hay, as it was bound to do when offered for transportation. *Levering v. Union Trust & Ins Co.*, 42 Mo. 88; *Angel on Carriers*, § 123. There was no evidence that hay was left strewn on the track of defendant's road. There was evidence that the hay received by defendant was loaded into its cars and the cars then loaded, were left standing on the track not "for several days in succession," as alleged, but when loaded were dispatched on the same day they were loaded. There was no evidence tending to show that "hay was left standing on

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the track several days in succession," nor was there any evidence that the cow in question was enticed thereby to the track of plaintiff, or was killed at a place where hay was left standing in the cars.

It having been held in the case of *Lloyd v. Pac. R. R. Co.*, 49 Mo. 199, that defendant could not lawfully fence up its depot to the exclusion of the public, negligence cannot be imputed to defendant for receiving hay, and loading it in its cars, when such cars are dispatched within a reasonable time. If the evidence had tended to show that the cars when loaded had been left standing, as charged, for several days in succession, and tended also to show that plaintiff's cow had been killed at that place, we would not interfere with the judgment, but it does not tend to show either of these things, and we are, therefore, of the opinion that the court erred in refusing to give defendant's instruction and in giving plaintiff's. The case as made by the evidence is wholly unlike the case of *Crafton v. Hann. & St. Jo. R. R. Co.*, 55 Mo. 580. In that case the defendant, in unloading salt from its cars, negligently spilled it on the track of its road, and negligently left it there, so that it attracted cattle, and the cow of plaintiff was found dead near the salt thus negligently left on the track. Had the evidence in this case tended to show that defendant so negligently loaded the hay in their cars as to scatter it on the track and negligently left it there, whereby cattle were attracted to it and plaintiff's cow was killed at such place, the cases would be analogous. Judgment reversed.

THE STATE V. REILEY, *Appellant*.

1. **Druggist: SELLING LIQUOR WITHOUT LICENSE.** The act of 1877 in relation to the sale of intoxicating liquor makes it a misdemeanor for a druggist, without taking out a license as a dram-shop keeper, either (1) to sell or give away (except for medicinal purposes) intoxicating liquors in any quantity less than one gallon, or (2) to permit intoxicating liquor, no matter for what purpose or in what quantity sold, to be drunk on the premises where sold.
2. ——— : ——— : **PRINCIPAL AND AGENT.** A druggist will be held criminally liable for the act of his clerk committed in his absence in selling liquor in violation of law, unless he shows that the sale was made without his assent.

Appeal from Audrain Circuit Court.—HON. G. PORTER,
Judge.

AFFIRMED.

Indictment against a druggist for selling liquor to be drunk on the premises, without license.

Forrist & Fry for appellant.

D. H. McIntyre, Attorney General, for the State.

SHERWOOD, C. J.—We think it very clear that the section under which the defendant was indicted, (Sess. Acts 1877, p. 342, § 1,) makes it punishable as a misdemeanor for a druggist: 1st, To sell or give away, except for medicinal purposes, intoxicating liquors in any quantity less than one gallon, without taking out a license as a dram-shop-keeper. 2nd, To permit such intoxicating liquors, no matter for what purpose sold, nor in what quantity sold, to be drunk on the premises where sold unless the druggist has a license as aforesaid. This section is so plain that time will not be wasted in its discussion. The instructions, taken as a whole, presented the case fairly to the jury and are in conformity to the view of the statute just announced. Defendant in his testimony does not deny,

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what is otherwise established, that he permitted liquor when sold for "medicinal purposes" to be drunk on the premises where sold. This makes him guilty under our construction of the statute.

And as to the sales by his brother George, who for a time was his clerk, defendant does not pretend in his testimony that he forbade his brother from permitting liquor sold for medicinal purposes to be drunk on the premises where sold. It is true that a principal is not criminally liable for the acts of his agent, when that agent acts in contravention of the commands of his principal. This point was so ruled in *State v. Baker*, 71 Mo. 475. But certainly when a clerk in the absence of his employer while engaged in the business of his employer makes a sale, or does any other act in connection therewith, which the law forbids, a *prima facie* case is made out against the employer, and unless rebutted, this fact will furnish a sufficient basis for a verdict of guilty. 2 Bishop Crim. Law, § 219; *Barnes v. State*, 19 Conn. 398. This is the rule in the case of the sale of a libelous publication by a general clerk. Lord Mansfield said in *Rex v. Almon*, 5 Burr. 2686: "The master may avoid the effect of the sale by showing he was not privy nor assenting to it nor encouraging it." The judgment is affirmed. All concur.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. MCGEE, *Appellant*.

1. **Cairo & Fulton Railroad Lands:** CONGRESSIONAL GRANT: FORFEITURE. The act of Congress of February 9th, 1853, granted certain lands to the States of Arkansas and Missouri for the purpose of aiding in the construction of the Cairo & Fulton Railroad, subject to the condition that the lands should revert to the United States if the road should not be completed within ten years. 10 Stat. at Large 155. The road not having been completed, on the 28th of

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June, 1866, Congress passed an act declaring that the act of 1853 "with all the provisions therein made, be, and the same is hereby revived and extended for the term of ten years from the passage of this act, and all the lands therein granted, which reverted to the United States under the provisions of said act, be and the same are hereby restored to the same custody, control and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took place," (14 Stat. at Large 338); *Held*, that the act of 1866 was not such a legislative declaration of forfeiture as would divest the State of the title granted by the act of 1853. It was rather the intention to waive the right of forfeiture accruing under that act.

2. — : LIMITATIONS. Where an act of Congress operates a grant *in praesenti*, (as did the above act of 1853,) the statute of limitations begins to run in favor of an occupant and against one claiming under the act, from the date of the former's entry.
3. — : —. The running of the statute of limitations as against one claiming under the above act of 1853 was not suspended by the enactment of section 7, page 746, General Statutes, Missouri, 1865.

Appeal from Stoddard Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

Ewing & Hough for appellant.

Smith & Krauthoff for respondent.

HOUGH, J.—This is an action of ejectment. The plaintiff recovered judgment, and the defendant has appealed to this court.

The following agreed statement was read at the trial: (1) The land sued for in this suit was a part of the lands granted by act of Congress, dated February 9th, 1853, to aid in building a railroad from a point on the Mississippi river opposite the mouth of the Ohio river, via Little Rock, to Fulton, Arkansas. (2.) Said land was sold to defendant by the Cairo & Fulton Railroad Company, a corporation duly organized under and by virtue of the laws of the State of Missouri, by a deed of conveyance in due

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form of law, January 3rd, 1859. Said deed was duly recorded in the office of the clerk of the circuit court of Stoddard county, Missouri, January 10th, 1859. (3) Defendant has lived and resided upon said land continuously from the date of purchase, using and cultivating the same as his own up to the institution of this suit, and has paid all the taxes and assessments made against said land since the date of his purchase. (4) Said land is included in the patent issued from the United States to the plaintiff in this suit, dated January 23rd, 1877.

The lands granted to the State of Missouri by the act of Congress of February 9th, 1853, were by the 3rd section of the act of the General Assembly of the State of Missouri of February 20th, 1855, granted to the Cairo & Fulton Railroad Company. On the 7th day of January, 1867, the Cairo & Fulton Railroad was conveyed by the State to McKay, Reed & Co., under and by virtue of the provisions of the act of February 19th, 1866. Thomas Allen having subsequently acquired their title to this road and its appurtenances, he and his associates, on the 23rd day of April, 1872, incorporated themselves under the act of March 20th, 1866, as "The Cairo, Arkansas & Texas Railroad Company." This company was afterward consolidated with the "St. Louis & Iron Mountain Railroad Company," under the name of "The St. Louis, Iron Mountain & Southern Railway Company." The Cairo & Fulton Railroad was constructed as projected, and on the 23rd day of January, 1877, a patent issued to the plaintiff for the lands in controversy, together with others of the same class. This constitutes the title of the plaintiff.

The lands in controversy are more than forty miles from the starting point of the Cairo & Fulton Railroad on the Mississippi river, and it does not appear that a sufficient number of miles of said road had been constructed at the date of defendant's purchase, to authorize a sale of said land under the act of Congress of February 9th, 1853.

The Cairo & Fulton Railroad not having been com-

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pleted within the time prescribed in the 5th section of the act of Congress of February, 1853, Congress passed an act on July 28th, 1866, to revive and extend the provisions of the act of February 9th, 1853, which declared that said act, "with all the provisions therein made, be, and the same is hereby revived and extended for the term of ten years from the passage of this act; and all the lands therein granted, which reverted to the United States under the provisions of said act, be and the same are hereby restored to the same custody, control and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect."

This act was not such a legislative declaration of forfeiture as would divest the State of the title granted by the act of February 9th, 1853. The purpose of the act was not to enforce a forfeiture of the estate granted by the act of 1853, but to waive any right of forfeiture which existed in favor of the United States at the time of the passage of the act of 1866, and to extend the time for the Cairo & Fulton road for the period of ten years from the passage of said last mentioned act.

As the act of Congress of February 9th, 1853, operated as a grant *in praesenti*, and the issuance of a patent was unnecessary to invest the State with the legal title to the lands therein designated, the statute of limitations began to run against the State and the Cairo & Fulton Railroad Company and all persons claiming title under said grant to the State, from the time the defendant entered into the possession of said land in 1859. The cases of *Gibson v. Chouteau*, 13 Wall. 92, and *Smith v. Madison*, 67 Mo. 694, are inapplicable to a case like the present.

Nor was the running of the statute suspended by the enactment of section 7, chapter 191, General Statutes 1865.

2. — : limita-
tions. — : —. *Abernathy v. Dennis*, 49 Mo. 469; *School District v. Goerges*, 50 Mo. 195; *McCartney v. Alderson*, 54 Mo.

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320; *Wickersham v. Woodbeck*, 57 Mo. 59; *Burch v. Winston*, 57 Mo. 62.

Upon the agreed statement of facts, therefore, the defendant was entitled to judgment, and the judgment of the circuit court will be reversed. The other judges concur.

THE STATE, *Appellant*, v. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY.

1. **School Taxes.** After the adoption of the constitution of 1875, and until the passage of the act of March 24th, 1877, (Sess. Acts 1877, p. 405,) no authority existed for levying taxes for school purposes in districts, exceeding forty cents on the \$100 valuation.
2. ——— : NOTICE OF ELECTION. Fifteen days' notice must be given of any election held under that act for the purpose of authorizing a tax exceeding forty cents on the \$100 valuation.

Appeal from Montgomery Circuit Court.—HON. G. PORTER, Judge.

AFFIRMED.

John M. Barker for appellant.

Wells H. Blodgett for respondent.

NORTON, J.—This action was commenced in the circuit court of Montgomery county to recover the sum of \$391.12, with penalties, fees and costs, which the plaintiff claims is the balance due the county of Montgomery for school taxes for the year 1877, the whole amount for said year being the sum of \$1,440.96, and the defendant having reduced it to the amount sued for by having paid \$1,049.84. The \$391.12 sued for is the excess over and above forty cents on the \$100 levied in said county for school purposes.

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The petition of the plaintiff is in the ordinary form, and states, in substance, that \$1,440.96 school taxes were lawfully assessed and levied against defendant for the year 1877; that defendant was entitled to a credit of \$1,049.84 paid thereon; and contained all other necessary allegations, and a prayer for judgment for \$391.12, with penalties, costs and fees. The defendant's answer was a general denial.

Upon trial in the circuit court, the parties submitted. the cause to the court upon the following agreed statement of facts: (1) The first point in issue is: The defendant maintains that the people of Missouri, prior to March 24th, 1877, had no power vested in them to vote a rate of tax for school or building purposes in excess of forty cents on the \$100; plaintiff holds to the contrary. (2) That on the 24th of March, 1877, the legislature passed an act authorizing the people of the State to vote a rate of taxes in excess of forty cents on the \$100 for school and building purposes; and the plaintiff maintains that the right already existed before that time. (3) The returns in the office of the clerk of the county court show, that all elections for increase of rate in the school tax for the year 1877, were held on the 3rd day of April, 1877; and that the vote on each proposition was according to law; but that no notice of the elections was given. (4) That no notice of fifteen days was given, of the time and place of such elections for the purpose of increasing the rate. (5) The plaintiff contends that such elections were good and valid, while defendant claims that they were void for failure to give the fifteen days' public notice thereof. (6) That said John M. Barker, prosecuting attorney of said county, was duly authorized by the county court of Montgomery county to prosecute this suit. (7) It is further agreed, that if the court finds for plaintiff on the point in issue as above stated, judgment shall be entered for plaintiff in the sum of \$391.12, and the costs and penalties thereon; and if the

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court finds for defendant on both said issues, judgment shall be entered for defendant.

Upon the above statement plaintiff asked the court to declare the law to be that under the pleadings and evidence the finding and judgment should be for plaintiff. The court refused to grant the request, and gave an instruction that under the pleadings and agreed statement of facts the finding must be for defendant, and this action of the court is assigned for error.

It is unnecessary to consider the question raised in the first and second points of the agreed statement of facts, except to say that after the adoption of the constitution of 1875, and until the passage of the act of March 24th, 1877, no authority existed for levying taxes for school purposes in districts, exceeding forty cents on the \$100 of valuation. *St. Jo. Bd. Pub. Schools v. Patten*, 62 Mo. 450; *State ex rel. v. Holladay*, 66 Mo. 387; *State ex rel. v. St. Louis, K. C. & N. Ry Co.*, 74 Mo. 163.

The only remaining point to be considered is, whether under the act of March 24th, 1877, (Acts 1877, p. 405,) notice is requisite to give validity to an election, authorized to be held by the first section of said act, for the purpose of increasing the rate of taxation above forty cents on the \$100 of valuation. That notice is requisite under the provisions of said act we entertain no doubt, for it is expressly provided in section 4 of the act as follows: "Said boards of directors, or boards of education, calling such election, shall cause at least fifteen days' public notice to be given of the time and place of holding such election or elections, and the purpose for which it is held, by publication in some newspaper published in such city, town or village forming such school district or other school district; and if no newspaper is published in such school district, then by five written or printed handbills, posted in five of the most public places in such district."

This section when considered in connection with the other sections of the act which provide that the rate of

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taxation shall not be increased above the rate of forty cents for school purposes unless "a majority of the voters who are tax-payers voting at said election, shall vote in favor of the increase," makes it clear, we think, that before any such election can have validity, as only tax-payers can participate or vote at such election, that they are entitled to notice of the time and place of holding it, and the purposes for which it is held, and that such notice must be given in the manner prescribed in said sections. The fact that section 3 of said act provides that such election may be held at the same time and place, and in the manner now provided by law for holding elections for school purposes, and that if so held the proposition must be voted on separately, does not in any manner dispense with the necessity of such notice. When an election is ordered under said section 1, the board, it is true, may fix the time of holding it at the annual school meeting, or they may fix it at some other time, but in either case when it is ordered and the time and place fixed, the tax-paying voters are entitled to the notice prescribed by said section 4. In the case of *McPike v. Pen*, 51 Mo. 64, upon a question involving necessity for notice of an election, although in that case the statute authorizing the county court to order an election, was silent as to notice, it was held that the necessity that the notice be given is so controlling—such an essential part in the machinery of an election that the irregularity in not giving it was fatal. The same position has been taken by the courts of other states upon a kindred question, as will be seen by a reference to the following authorities: *School District v. Atherton*, 12 Met. 105; *State v. Van Winkle*, 25 N. J. (1 Dutch.) 73; *People v. Castro*, 39 Cal. 65; *Cardigan v. Page*, 6 N. H. 189; *Jordan v. School District*, 38 Me. 164; *Independent School District*, 33 Pa. St. 297; *People v. Jackson*, 92 Ill. 454; Cooley on Taxation, p. 246. Perceiving no error in the action of the court, judgment affirmed, in which all concur.

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THE STATE *ex rel.* VAN BROWN v. VAN EVERY *et al.*, *Appellants.*
 (And Eight other Cases.)

1. **Hannibal City Taxes: LIEN FOR THEM: ENFORCEMENT THEREOF:** GENERAL REVENUE LAW 1872. Since the passage of the general revenue law of 1872 the city of Hannibal has had no right of action in her own name to enforce the lien for delinquent city taxes. That lien, vested in the city by the charter of 1870, was taken from her by the above mentioned law and vested in the State and is to be enforced by suit in the name of the State.
2. ———. The charter of the city of Hannibal passed in 1873, as amended in 1874, conferred upon the city in addition to the power to levy taxes for general city purposes to the extent of one and a half per cent, a further power to levy taxes to pay the principal and interest of compromise bonds of the city to the extent of half of one per cent, and also a further power to levy a tax sufficient to pay any judgment that might be obtained against the city. Acts 1873, p. 241, §§ 1, 3; Acts 1874, p. 299.
3. **City Taxes: SPECIAL LEVIES.** When once a levy of taxes for general purposes has been made by a city, whether of less than the maximum rate allowed by law or not, no special levy even for an object that might properly be classed under the head of general purposes, can be made, in the absence of a provision of law authorizing it.
4. ———: CONSTITUTIONAL LAW. Section 11, article 10 of the constitution of 1875, operates a limitation upon the power of the general assembly to authorize cities and incorporated towns to levy taxes, but of its own force, confers no power to levy them.
5. **Taxes: COLLECTOR'S CERTIFICATE AS EVIDENCE: CONSTITUTIONAL LAW.** The provision of the present delinquent tax law which makes the collector's certificate *prima facie* evidence of the facts therein recited cannot be held unconstitutional as impairing the right of trial by jury. R. S. 1879, § 6837.
6. **Delinquent Taxes: JURISDICTION OF JUSTICE OF THE PEACE: RECORDER OF CITY OF HANNIBAL.** The present delinquent tax law confers upon justices of the peace jurisdiction of suits to collect delinquent taxes. R. S. 1879, § 6836. In the city of Hannibal their jurisdiction is concurrent with that of the city recorder.

Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

Some of the cases were reversed, some affirmed.

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Thos. H. Bacon for appellants.

T. S. Howell for respondent.

HENRY, J.—These suits were instituted, a portion of them in the Hannibal court of common pleas, and the others before a justice of the peace of Marion county, to recover delinquent taxes, and enforce alleged city liens therefor against the real estate of the respective defendants, on which said taxes were assessed by the city. Plaintiff obtained judgment in all the cases, and they are here on appeal from the Hannibal court of common pleas, to which the cases originating in the justice's court were appealed, and the appellants contend that the city of Hannibal, and not the State of Missouri, was the proper party to sue.

In the case of the *State ex rel. Van Brown v. Sheperd*, 74 Mo. 310, the contrary was held, but, in a very able brief, we are urged by Mr. Bacon, for appellants, to reconsider the question, and a careful examination of all the points made in his brief has confirmed us in the opinion delivered in that case.

In the *City of Kansas v. Payne*, 71 Mo. 160, we held that the City of Kansas was the proper party to sue to enforce her lien for delinquent taxes: 1st, Because by the 24th section of the charter of that city, approved March 24th, 1875, the liens on real property theretofore declared in favor of the State for delinquent city taxes, were transferred to the city; and by section 76 of the same act, it was expressly provided that in all cases where taxes had become delinquent before the passage of the act, suit might be brought in the name of the City of Kansas to enforce collection of such taxes, etc., in any court of competent jurisdiction. It was contended that, by an act of the general assembly, approved April 24th, 1879, entitled "An act to amend sections 2, 3, 4, 5, 9, 11, 14, 17 and 18, of an act approved April 12th, 1877, entitled 'An act to provide for

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the collection of delinquent State taxes due the State, and repealing section 184 of an act concerning the assessment and collection of the revenue, approved March 30th, 1872," the foregoing provisions of the charter of Kansas City were repealed, but it was held that if that act was intended to apply to Kansas City, it was to that extent unconstitutional, there being nothing in the title of the act to indicate such purpose; that the subject of the collection of taxes in a city which had a right and a remedy to collect them by suits in its own name, is not embraced in the phrase "State taxes."

By an act amendatory of the act incorporating the city of Hannibal, approved March 25th, 1870, it was provided that: "All taxes levied by the mayor and city council shall be a lien on the real estate on which the same may be imposed, and said lien shall continue until said taxes are paid." It was not expressly declared that the lien shall be held by the city, but the reasonable interpretation of the provision is, that the lien was given to the city, inasmuch as at that date no act of the general assembly had ever declared a lien in favor of the State for city or town taxes.

By an act approved March 30th, 1872, entitled "An act concerning the assessment and collection of the revenue," it was provided that: "Real property shall in all cases be liable for all taxes due any city or incorporated town or school district, and a lien is hereby created in favor of the State of Missouri for all such taxes, the same as for State and county taxes which lien shall be enforced as in this act provided." The term "revenue" is a general term, embracing as well city, town and county, as State revenue. The general assembly has absolute control of the revenues which counties, cities or towns are authorized by law to raise by taxation. Therefore, the title of the act of 1872 embraced the revenues of the towns and cities of the State unless some special provision of a city or town charter

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withdrew its revenues from the provisions of the general statute.

It is insisted, however, that the effect of repealing the charter provision of the city of Hannibal is not to be given to the act of 1872, because at the same session of the legislature an act was passed amending the charter of the city of Hannibal, by which exclusive jurisdiction was given to the recorder of said city, in all cases arising in the collection of all the general and special city taxes, when the same are delinquent, in such proceedings as might be provided by ordinance. It does not necessarily follow because the act in question gave the recorder exclusive jurisdiction of suits for taxes due the city, that the city of Hannibal was the proper and only party to institute such suits. The authority given to the county collector to sue in the name of the State for city delinquent taxes, is not repugnant to the jurisdiction conferred upon the recorder by that act. Both provisions may stand together, and the result would be that in suing for delinquent taxes assessed by said city, the county collector would have to institute his suits before the recorder. It was but the creation of an additional court, with exclusive jurisdiction in such cases, and there is nothing in the section indicating whether the city or county collector was the proper party to sue in those cases.

The provision in relation to the State lien for town and city delinquent taxes which first appeared in the act of 1872, has been substantially continued in all subsequent revenue acts, and by section 2 of the act of 1879, the register, city clerk or other proper officer, of all cities having a population of 5,000 inhabitants or more, were required, within sixty days after the act took effect, to make in a book to be called the "back tax book," a correct list of all tracts of land and town lots on which back taxes should be due in such city for all the years for which the same might be delinquent, and deliver it to the collector of such city; and by section 7: "All back taxes, of whatever kind, whether State, county or school, or of any incorpor-

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ated town or city, appearing due upon delinquent real estate, shall be extended in the 'back tax book' made under this act, and in case the collector of any city or town shall have omitted or neglected to return to the county collector a list of delinquent lands and lots, as required by section 178 of an act concerning the assessment and collection of the revenue, approved March 30th, 1872, the present authorities of such city or town may cause such delinquent list or lists to be certified as by said section contemplated, and such delinquent taxes shall be by the county clerk put upon the 'back tax book' and collected by the collector under the authority of this act;" and by a proviso to the section, in all cases where the auditor or other proper officer, is required by provisions of the charter of any city of 5,000 or more inhabitants to make the list for city delinquent taxes, in this section provided for, and deliver it to the collector of such city, he shall proceed to collect such delinquent tax list so made, in the manner and under the authority provided by this act and that to which it is amendatory. The exception in the proviso clearly shows that all cities and towns are embraced, except those of 5,000 inhabitants or more, whose charters contain the provisions named in the proviso; and such provisions are not contained in the charter of the city of Hannibal.

Section 178 of the act of 1872, referred to in the foregoing section of the act of 1879, required the collectors of all cities and incorporated towns having authority to levy and collect taxes, on or before the 1st day of May annually to return to the county collector a list of lands and lots on which taxes levied by such city or town remained due and unpaid, and made it the duty of such collector to obtain judgment and sell the real estate. These various provisions leave no escape from the conclusion, that the city of Hannibal has no right of action in her own name, to enforce the lien for delinquent taxes levied by her. The lien given her by her charter of 1870, was taken from the

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city, and given to the State, by the act of 1872, and was continued in the State by the subsequent acts.

It must be admitted that the revenue law contains many provisions which are apparently repugnant to each other, and it is no easy task to place such a construction upon them as one may confidently rely upon. Much may be, and in Mr. Bacon's brief has been said, against the conclusion we have reached, worthy of consideration, but that conclusion is the more reasonable, considering all the sections of the several statutes bearing upon the question, and we, therefore, adhere to it.

Appellants further contend that a portion of the taxes sued for were levied without authority of law, viz: the 2 — "judgment tax," the "compromise tax" and the "floating debt tax." One-half of one per cent was levied as a judgment tax, and the same amount as a compromise tax for each of the years 1873, 1874 and 1875; and for the year 1876 the levy for the floating debt tax was seven-tenths of one per cent, and for each of the years 1877 and 1878, four-tenths of one per cent; and in neither of the years 1876, 1877 and 1878 did the aggregate of the levy for general purposes and the floating debt tax, exceed the per centum which the city was authorized to levy for general purposes. The appellants' position is, that the aggregate of all the authorized taxes could not lawfully exceed one and one-half per cent.

The city charter as amended in 1873, contains the following provisions:

Art. 4, Sec. 1. "The city council shall have power within the city, by ordinance not inconsistent with the constitution or any laws of the State, to levy and collect taxes annually upon all real and personal property within the limits of the city for general purposes, not to exceed one and one-half of one per cent upon the appraised value thereof, and to enforce the collection of the same."

Sec. 3. "To levy and collect annually a tax of one-half of one per cent on all the property of said city by law

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subject to taxation, which shall be a special tax for the purpose of paying the principal and interest on the compromise bonds of said city which have been or may hereafter be issued in settlement of its existing debt."

By section 1, it will be observed, the city council is authorized to levy a tax of one and one-half per cent for general purposes, and by section 3, a special tax of half of one per cent for the purpose of paying principal and interest on the compromise bonds of the city, which then had or might thereafter be, issued, etc.; and by an amendment of the charter of the city, in 1874, it was provided that: "Whenever any final judgment shall have been rendered by any court of competent jurisdiction, against the city of Hannibal, the city council of said city shall have power forthwith to levy a special tax sufficient for the payment of the same and the expense of the collection thereof, upon all real and personal property within said city subject to taxation for any purpose, and the money so collected shall be held as a trust fund, subject to be used only for the payment of the judgment on account of which said tax was levied, and the necessary expenses of collecting and disbursing the same." The levy of these special taxes, expressly authorized by the charter, did not deprive the city of the authority to levy, in addition, one and one-half per cent for general purposes. The sections of the charter providing for the levy of these special taxes did not repeal the section authorizing the levy for general purposes, nor is the section authorizing the levy of one and one-half per cent for general purposes to be regarded as a limitation upon the city authorities to levy taxes, but only as a limitation upon the amount to be levied for general purposes. That the "judgment" and "compromise" taxes are not taxes for general purposes, the legislature has declared, by the acts in question; and however the purposes for which those taxes were levied might be considered in the absence of the legislative declaration, we are bound to regard

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them as they have been expressly designated by the legislature.

With regard to the floating debt tax, we are satisfied that there was no authority for its levy. It cannot stand on the ground that it was for general purposes, and that the tax levied for general purposes, *eo nomine*, was less than the maximum, by the amount of the floating debt tax. When once a levy for general purposes has been made, whether of less than the maximum rate or not, no special levy, even for an object that might properly be classed under the head of "general purposes," can be made in the absence of a provision of law authorizing it. A municipal corporation can levy no tax that is not authorized by its charter. *Henry v. Bell*, ante, p. 194; 2 Dillon on Munic. Corp., § 605. And statutes authorizing the levying of taxes are strictly construed. *Ib.*, note 2, p. 707.

Section 11, article 10 of the constitution of 1875, conferred no power upon the city to levy any tax whatever. It limited the rate of taxation in cities and towns, and, by the last clause of the section, declared that such restriction as to rates should apply to taxes of every kind and description, general or special, except taxes to pay valid indebtedness then existing, or bonds which might be issued in renewal of such indebtedness. This section was self-enforcing so far as it limited the power of the general assembly to authorize cities and incorporated towns to levy taxes, but of its own force conferred no power whatever upon cities and towns to levy taxes. Such powers they derive from acts of the general assembly and not directly from the constitutional provision we are considering.

It is also urged that the delinquent tax law is unconstitutional as impairing the right of trial by jury, in that it makes the collector's certificate *prima facie* evidence of the facts therein recited. We are not of that opinion. By the statutory

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4. ———: constitutional law.

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law of this State, certain recitals in a sheriff's deed to land sold for taxes or on execution are made *prima facie* evidence of the facts recited, and such provisions have been uniformly upheld. It has been decided that a law declaring such recitals conclusive evidence of the facts so recited, is unconstitutional, but that is as far as this court has gone in that direction.

We do not understand the case of *Clark v. Mitchell*, 64 Mo. 580, to sustain the appellants' position on this subject. The following language occurs in that opinion: "If in *Plimpton's case* it was violative of the constitutional right of trial by jury to allow the report of commissioners, who, duly appointed and sworn, reported the facts they regarded as proved, to be *prima facie* evidence of those facts, how much more is that act an invasion of constitutional right which makes a mere arbitrary military edict a conclusive bar to plaintiff's recovery?" The closing lines of that paragraph indicate the nature of the case then before the court, and the balance is not an expression of unqualified approval of the doctrine announced by the supreme court of Vermont, in *Plimpton v. The Town of Somerset*, much less of a doctrine which nullifies our statutes in relation to sheriff's deeds above referred to.

Another point urged by appellants' counsel is, that the justice of the peace had no jurisdiction of those of the cases under consideration which originated in a justice's court. We are of a different opinion. Section 4 of the act of 1879, amendatory of section 5 of the act of 1877, reads as follows: "If on the 1st day of January, 1878, any of said lands or town lots contained in said 'back tax book' remain unredeemed, it shall be the duty of the collector to proceed to enforce the payment of the taxes charged against such tract or lot, by suit in the courts of competent jurisdiction of the county, * * * which said courts shall have jurisdiction without regard to the amount sued on, to enforce the lien of the State or such cities; *

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the peace: record-
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nibal.

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* and in all cases before justices of the peace where suit is brought for the enforcement of liens as above, where summons shall have been issued against any defendant and the officer to whom it is directed shall make return that the defendant cannot be found, the justice of the peace before whom the suit is pending, being first satisfied that the summons cannot be served, shall make the order as above," and then proceeds to prescribe in what manner the order of publication shall be published, and that if defendant fail to appear at the time and place required by such order, and defend said cause of action, judgment by default shall be rendered as prayed, and shall be as binding and effectual against the property on which the lien is sought to be enforced as if there had been personal service on the defendant.

It is to be noted that the section provides that the justice, being satisfied that the summons cannot be served, "shall make the order as above," when there is nothing in any preceding section in relation to such order. Hence, it is contended that the section by which the attempt was made to confer jurisdiction on justices of the peace, is imperfect and unavailing for that purpose. There is, however, enough in section 5, as amended, to accomplish the object. It provides for an order of publication, when, where and how it shall be published, and clearly enough indicates what it shall contain. It is to be a notice to the defendant of the nature of the suit, where pending, the names of the parties, and the purpose and object of the proceeding, and where and when defendant is required to appear and answer. Omitting any of these elements it would be no notice.

Section 7 of the act of 1877, requires a transcript of the judgment rendered by a justice of the peace to be filed in the office of the clerk of the circuit court of the county or city wherein it is rendered, and provides for the issuance of a special *fieri facias*, describing the real estate

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named in the transcript, directed to the sheriff and commanding him to advertise and sell the property, etc.

From these several provisions we think the jurisdiction of the justice incontestable; and we are also of the opinion that the amendment of the charter of the city of Hannibal conferring exclusive jurisdiction upon the recorder in suits to recover delinquent city taxes, to the extent of the exclusiveness of such jurisdiction, was repealed because utterly repugnant to said provisions of the acts of 1877 and 1879, and in the view we have taken of that charter provision, it only provided a special jurisdiction for the enforcement of a tax lien held by the State for taxes which, although levied by the city for city purposes, had by reason of being delinquent, become State taxes subject to the absolute control of the State. By a provision of the charter of the city of Hannibal, the recorder is made *ex officio* a justice of the peace, and both as recorder and justice of the peace, has jurisdiction of actions for the recovery of delinquent taxes, but it is no longer exclusive.

Objections are also made to the sufficiency of the several petitions, but we shall dispose of them by saying, that we think them untenable. This opinion would be interminable if all the points made by the laborious and ingenious counsel were considered at length. His brief of seventy-six pages of printed matter, is an evidence of his industry and indefatigability, as well as of his learning, and if some of the points made by him, receive only a passing notice, it is not because we have not carefully considered them, but that it would require more time to elaborate than we deem it necessary to bestow upon them.

For the foregoing reasons the judgments in the following of the above cases are affirmed, viz: *The State ex rel. Van Brown v. Jas. H. Collins*; *The State ex rel. Van Brown v. J. A. Van Every*; *The State ex rel. Van Brown v. Alex. Bowling*, (two cases); *The State ex rel. Van Brown v. Frederick Waller*. In the balance of the cases the floating debt

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tax was levied, and the judgments in those cases are reversed and the causes remanded. All concur, except Norton, J., absent.

THE STATE V. BURGESS, *Appellant*.

Venue. Judgment reversed because the venue of the offense was not proven.*

Appeal from Platte Circuit Court. — HON. G. W. DUNN,
Judge.

REVERSED.

Wilson, Woodson & Merryman for appellant.

D. H. McIntyre, Attorney General, and *J. W. Colburn*,
Prosecuting Attorney of Platte county, for the State.

SHERWOOD, C. J.—We reverse the judgment herein, and remand the cause, for the reason that no venue was proven. True, it was in evidence that the homicide was committed in "Camden Point," and the defendant testified that he had "been in Platte county four or five days before the difficulty," but it nowhere appears that "Camden Point" is in Platte county, nor is to be inferred that it is in that county from the testimony of defendant as to his whereabouts for four or five days prior to the occurrence on which the indictment is based. This case is, therefore, on all-fours with that of *State v. McGinniss*, 74 Mo. 245. We shall not rule on any other question in the case, as it may not be necessary in the event of a new trial. All concur.

*See *State v. Hartnett*, ante, p. 251.

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FRICK V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY
COMPANY, *Appellant*.

1. **Parent and Child**: INFANT CHILD WANDERING FROM HOME: NEGLIGENCE. A child two years of age, without the knowledge of its parents, escaped from its home and strayed upon a railroad track, where it was injured. It did not appear how it got upon the track, or that it was ever known to have been there before, or that its absence had been discovered when the accident occurred. Its father was a butcher, and at the time was at his shop in another part of the city. Its mother, besides the care of her household duties, in which she had no help, had charge of an infant about one month old. *Held*, that under these circumstances the father could not, as a matter of law, be held chargeable with negligence in permitting the escape of the child.
2. ———: MEASURE OF DAMAGES. A father whose child has been injured through the negligence of another, is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and care of the child, and the expense resulting from the injury for a period not extending beyond the minority of the child, including surgical attention, care, nursing and the like.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

The child was about two years of age at the time of the injury.

Wells H. Blodgett for appellant.

McGaffey & Steber for respondent.

RAY, J.—The accident and injury complained of in this case, is the same as that which constitutes the subject matter of the action in the case of *Lulu Frick* against the same defendant, (recently decided by this court at the October term, 1881, and not yet reported).* The only difference between the two cases is, that in the former the little girl, who was injured by the accident in question, sought by her next friend, to recover the damages she had sus-

*See page 595.

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tained by reason of the loss of an arm and a leg, the result of said accident; whilst in the present suit the father of that girl is seeking to recover the damages he has sustained by reason of his loss of her services, his care and trouble in nursing and taking care of his child, and the expenses incurred in her surgical and medical treatment consequent upon said injuries. In this case, as in the other, the defendant, at the close of plaintiff's testimony, offered an instruction in the nature of a demurrer to the evidence, which was overruled by the court, and excepted to by the defendant.

At the close of the evidence on both sides, the court gave for the plaintiff, over the objection of the defendant, the following instructions, to-wit:

1. If the jury believe from the evidence that in permitting their child to escape from the control of its mother, and wander upon the track of defendant's railroad, plaintiff or his wife failed to exercise that degree of care and prudence which people in their circumstances and condition in life should exercise toward their offspring, yet such want of care will not operate to defeat plaintiff's right of recovery in this action, if the jury further believe and find from the evidence that the accident by which the child was injured could have been prevented by the exercise of ordinary care and prudence on the part of the servants and employes of the defendant, in charge of the train which caused the accident.

2. It is not evidence of negligence on the part of the defendant, that it had not fenced its railroad at the locality where the alleged injury occurred. But if the jury find from the evidence that defendant, its agents or employes, notwithstanding said road was not required to be fenced, could, by the exercise of ordinary prudence and care, have avoided or prevented the injury to plaintiff's child, then they should find for the plaintiff; and should assess his damages at an amount which will fully compensate and indemnify him for the consequent loss of service and requi-

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site care of the child, and expenses which the evidence shows, result from the injury, for a period not exceeding the minority of the child—that is, until she is eighteen years of age; and they should further allow the amount of expenses which the plaintiff has incurred, or become liable for, in consequence of the injury, such as for surgical attention, care, nursing and the like. And if they find for the plaintiff, he is entitled to the foregoing and no more, unless the jury further find that the plaintiff was guilty of negligence directly contributing to the injury.

3. In determining the question as to whether the defendant or its servants and employes were guilty of negligence or want of ordinary care and prudence in the premises, the jury are authorized to and should take into consideration the time of day, the place at which the accident occurred, the manner in which the train was being propelled, the number of dwelling houses in that vicinity, their distance from the track, and the signals and warnings of approaching danger which were given, if any. What would be ordinary care and prudence in running a train of cars in a sparsely populated locality, might be negligence in a more populous district. And it is for the jury to determine, in view of all the facts and circumstances of the case, whether defendant or its servants and employes did exercise ordinary care and prudence.

The court also gave for the defendant the following instructions, to-wit:

2. Although the jury may believe from the evidence that the plaintiff's child was run over and injured by defendant's cars, yet that fact alone does not entitle plaintiff to a recovery in this action; but before the plaintiff can recover he is bound to prove to the satisfaction of the jury that his child was injured in direct consequence of the negligence of the persons who were in charge of the train, and unless he has so proven, the verdict must be for defendant.

3. If the jury believe from the evidence that the per-

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sons in charge of the train were exercising care in running, conducting and managing the same, and that they did not discover the child upon the track or see her approaching the same in time to prevent the injury complained of, then the plaintiff cannot recover in this action, and the finding must be for defendant.

4. Defendant had a lawful right to run its trains upon its track, at the place where the injury occurred, either forwards or backwards, and the fact that said train was being run, at said time, with the engine in the rear of the flat cars, does not constitute any negligence on the part of the defendant, or on the part of those who were in charge of said train.

6. There is no evidence in this case tending to show that the plaintiff's child was wantonly or purposely injured by those in charge of defendant's train.

7. If the jury believe from the evidence that the persons in charge of the train were exercising ordinary care in running, conducting and managing the same; and that after the dangerous situation of the child was discovered by them, the train could not have been stopped in time to prevent the injury complained of, then the plaintiff cannot recover in this action; and the finding must be for the defendant.

8. In determining the question, whether the plaintiff or his wife was guilty of negligence, the jury should take into consideration the fact that they permitted the child to go unattended upon the track of the defendant's railroad, where they knew the trains were frequently passing; and if the jury find that they were guilty of negligence which directly contributed to produce the injury complained of, then the finding must be for the defendant.

9. If from all the facts and circumstances in evidence in this case, you believe that the injuries of the said Lulu Frick were the result of accident or misadventure, without any culpable negligence on the part of any one, then the finding should be for the defendant.

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The following instructions asked by the defendant were refused by the court, and excepted to by defendant:

1. Under the evidence given in this cause, the jury will find for the defendant.

5. It was negligence for the plaintiff or his wife to suffer or permit the child mentioned in the petition to go unattended upon the track of defendant's railroad, where they knew its trains were frequently passing; and, under the pleadings and evidence in the case, the plaintiff cannot recover, unless the jury believe from the evidence that the child was wantonly or purposely injured by those in charge of the train.

Under the above instructions the cause was submitted to a jury. They found a verdict for the plaintiff, and assessed his damages at \$4,585. The defendant, in due time, filed its motion for a new trial and in arrest of judgment. The plaintiff then remitted from the verdict the sum of \$1,500, and thereupon the court overruled said motions, and gave judgment accordingly; whereupon the defendant appealed to the St. Louis court of appeals, where the judgment of the trial court was affirmed, from which defendant appeals to this court.

The question presented for our consideration is, shall we make a disposition of this case different from that made in the other case? The material testimony and controlling legal questions involved in both cases are substantially the same; and conceding, as we do, that the other case, under the facts and circumstances therein stated, was correctly decided, we are unable, after a careful examination of this record, to see any reason why it should be withdrawn from the operation of the rules there laid down.

The distinction between the two cases, growing out of the doctrine of contributory negligence, if, under the facts of this case, it has any existence, was not pressed upon our attention at the oral argument, if noticed at all; and we, therefore,

I. PARENT AND
CHILD: infant
child wandering
from home: neg-
ligence.

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deem it unnecessary to examine it at any great length. It is, perhaps, sufficient to say that the evidence tends to show that the child temporarily escaped from home, and strayed upon the railroad track, without the knowledge or consent of its parents. It does not appear how it got upon the track, or that it was ever known to have been there before, or that its absence from home had been discovered when the accident occurred. Its father, the plaintiff, was a butcher, and at the time was at his shop in another part of the city; while its mother, besides the care of her household duties, at the time had charge of an infant about one month old, and the family were without servants or other help. It cannot, therefore, be held, as a matter of law, that the plaintiff actively permitted or consented to his child's going upon the railroad track; or that he failed to exercise such care for the safety of his child as ordinarily prudent persons, in his situation, deem proper and sufficient in like circumstances. If so, he is not chargeable, as a matter of law, with contributory negligence, and while the instructions on this point, in their phraseology, are somewhat objectionable and inapplicable to the facts of the case, they furnish no sufficient reason for a reversal. *O'Flaherty v. U. P. R. R. Co.*, 45 Mo. 74; 38 N. Y. 455; *Boland v. Mo. R. R. Co.*, 36 Mo. 489; 72 Pa. St. 172; *Cooley on Torts*, 682; *Huelsenkamp v. Citizens' Ry Co.*, 37 Mo. 552; *Koons v. St. Louis, I. M. & S. Ry Co.*, 65 Mo. 596; *Stillson v. Hann. & St. Jo. R. R. Co.*, 67 Mo. 671.

As to the measure of damages, the instructions given on that subject seem to be in harmony with prior rulings of this and other courts on the same subject. 2. —: measure of damages. *Smith v. St. Joseph*, 55 Mo. 456; *Hilliard on Remedies for Torts*, (2 Ed.) p. 633, § 14; 26 N. Y. 49; 48 Pa. St. 320.

In the other case the conclusions reached and announced, were arrived at after a patient examination of the authorities and an earnest discussion of the legal questions involved. At the re-argument of this case these au-

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thorities and questions have again undergone a searching, able and interesting re-examination and discussion by counsel on both sides. We have given this re-examination and discussion a thoughtful consideration; and while impressed with the importance of the question, as well as the varied and conflicting rulings suggested by the argument, we have not been able to find any sufficient reasons for changing the conclusions heretofore reached and announced. The judgment of the St. Louis court of appeals affirming that of the trial court, is, therefore, affirmed. All the judges concur, except SHERWOOD, C. J., who dissents.

WAYLAND V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

1. **Nuisance: LIABILITY OF PURCHASER.** A purchaser of land, while not liable for damages caused by the erection of a nuisance on the land before his purchase, is liable for those caused by its continuance after the purchase and after he has knowledge of it; but he is not liable for either the erection or continuance of a nuisance created by his vendor before the sale, on adjoining land.
2. **Case Adjudged.** A railroad company, for the purpose of draining a lake into an adjacent river, connected the two by a ditch dug for the most part on its right of way, but where it emptied into the river on land of another. When the water in the river was high, it ran through the ditch into the lake and flooded the adjoining country. If no part of the ditch had been dug, except so much as was outside the right of way, the same thing would have happened. If no part had been dug except what was on the right of way, it would not have contributed to the overflow. The company which dug the ditch sold its right of way and other property to another company, and after the sale the lands of an adjoining proprietor were damaged by an overflow from the river. In an action against the latter company to recover the damage; *Held*, that it was not liable.

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Appeal from Chariton Circuit Court.—HON. G. D. BURGESS,
Judge.

REVERSED.

Wells H. Blodgett for appellant.

The action is to recover damages for making and maintaining a ditch which injuriously affected the plaintiff's land. The evidence is, that defendant did not make the ditch, and, hence, there need be no discussion of its liability for the making of it, and thereby committing a trespass or creating a nuisance. The only question is, whether, under the facts in the case, the defendant is legally responsible for maintaining or continuing a nuisance, to abate which it would be compelled to commit a trespass by going upon the lands of another and filling up the ditch. This question must be answered in the negative. *Kansas Pacific Ry Co. v. Muhlman*, 17 Kas. 224. If the North Missouri Railroad Company entered upon the lands of an adjoining owner and without permission dug a ditch, then the North Missouri Railroad Company was responsible in an action of trespass for all damages naturally resulting from such an act. If in consequence of the ditch, the lands of a third party were injuriously affected, the duty of abating the nuisance by filling up the ditch would devolve upon the owner of the land, and not upon the North Missouri Railroad Company, who to remedy one wrong would have to commit another. *Clegg v. Dearden*, 64 Eng. Com. L. 600.

Bell, Huston & Mullins for respondent.

The railroad company had no right to divert the water of the river from its natural channel. Angell on Water-courses, (7 Ed.) § 97; *Parker v. Griswold*, 17 Conn. 299; *McCord v. High*, 24 Iowa 336; or to flood the plaintiff's

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land without his consent. *Moffett v. Brewer*, 1 G. Greene (Iowa) 348; *Brown v. R. R. Co.*, 12 N. Y. 486; *Young v. R. R. Co.*, 28 Wis. 171; *Vedder v. Vedder*, 1 Denio 257; *Pinney v. Berry*, 61 Mo. 359; *Rose v. St. Charles*, 49 Mo. 509.

HENRY, J.—This suit was for the recovery of damages to plaintiff's land, occasioned by an overflow of the same with water from the Chariton river, alleged to have been caused by ditches dug by defendant in the construction of its road, to drain a lake into said river.

The following is the petition: "Plaintiff states that defendant is a duly incorporated railroad company under the laws of this State, and was so incorporated at the time of committing the grievances hereinafter stated. Plaintiff further states that the railroad track and bed of defendant crosses the middle fork of the Chariton river in the north half of the northeast quarter of section 1, township 53, range 17, in the county of Chariton aforesaid, and that on the west side of said river and on said quarter section of said land defendant caused to be constructed and maintained in the year 1872, and has continued, ever since said time, to maintain certain ditches of large capacity, to be dug and kept open on the north and south sides of said track, where the same crosses said river as aforesaid, whereby the natural flow of the waters of said river has become diverted from their natural channel, and caused the waters of said river to overflow and submerge certain lands belonging to and which have belonged to plaintiff ever since the year 1872, which lands are known as the northwest quarter of section 12, township 53, range 17, in said county of Chariton, and that said lands were valuable for farming purposes, but by reason of the overflow caused by the diversion of said river from its natural channel by means of said ditches maintained by defendant as aforesaid, the said lands have become wholly worthless, and that by reason thereof, the plaintiff, for the years 1873, 1874, 1875,

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1876, 1877 and 1878 has been wholly deprived of the use of said lands for any farming purposes whatever. All of which said facts defendant well knew, wherefore plaintiff says he has been damaged in the sum of \$1,500, for which he asks judgment."

The plaintiff's testimony established the following facts: In the fall of 1866, and the winter of 1867, the North Missouri Railroad Company, defendant's predecessor, dug two ditches. One of these ditches was on the north and the other on the south side of the railroad. The main body of the water comes on to plaintiff's land through the north ditch, and that ditch connects with the river about fifty feet from the right of way, on land never owned by the defendant or the old North Missouri Railroad Company. When the ditches were dug by the North Missouri Railroad Company, they were so small that one could step across them, and in that condition would have occasioned no injury to plaintiff's land, but the water from the river and the lake, running through, widened and deepened them until at the trial of the cause, they were twenty or thirty feet wide and eleven or twelve feet deep. The defendant began operating the road in 1872, and has never done anything to widen or deepen the ditches, but in 1877, attempted to close them up. The ditch on the south side, plaintiff testifies, was not dug to drain the lake, and is over thirty feet from the right of way of the company. He also stated that "as the north ditch was originally built it would have done my land no injury, unless the creek had staid up a long time. The damage I complain of was caused by the ditch getting larger every year; every rise in the creek made it larger." He further states that in 1874 or 1875, the defendant cut down the bank of the river, two or three feet for a distance of twenty feet where it built a bridge over the creek. The water that came out under the bridge ran into the big ditch, and after that, into the lake, and from the lake into the bottom. All the evidence tends to show that plaintiff's injury was occasioned by the north

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ditch, except that of plaintiff with respect to the lowering of the bank of the creek by defendant where the bridge was erected.

The court, for plaintiff, gave the following instructions to the jury :

1. Although the jury may believe from the evidence that plaintiff's land may have been subjected to overflow, and that it would have been overflowed during the years named in the petition by the waters of the creek getting out over their banks, even if there had been no ditches at the point where the railroad crossed the creek, yet, if they further find that, after notice or knowledge of the injury caused by the ditches on defendant's right of way, defendant maintained or permitted such ditches to remain open, or insecurely or insufficiently closed, and that thereby plaintiff's land was overflowed sooner, and water remained on it longer, or the quantity of water on it was increased, or it was turned upon his land at a different place or in a different manner from what it would have naturally flowed, then their finding should be for plaintiff.

2. Notice to defendant's chief engineer was notice to defendant.

3. If the jury find for plaintiff they should allow him for all injury, if any, to the rental value or use of his land resulting from its overflow by defendant by reason of the ditches on its right of way, after defendant had notice or knowledge of such overflow up to the time when this suit was brought; not, however, exceeding in all the sum of \$1,500.

4. Although the jury may believe from the evidence that the middle fork of the Chariton did annually overflow its banks and submerge the lands of plaintiff, mentioned in the petition, before defendant's road was built, yet, if they further believe from the evidence that in consequence of ditches which may have been cut by the North Missouri Railroad Company on its right of way, said lands were submerged for a longer period of time, and that said lands,

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in consequence of such length of overflow, were injured as a pasture, the jury should find for plaintiff such damages as may have occurred to said lands from said cause after defendant had notice of such injury, not exceeding \$1,500.

At the request of the defendant, the court instructed the jury as follows, to-wit:

2. If the jury believe from the evidence that the lands of plaintiff were flooded and rendered valueless by extraordinary rain-falls or by extraordinary rises and freshets in Middle Fork, causing its waters to escape its banks, and spread out generally over the surrounding country, then the jury are instructed that they must find for defendant for such years as they may believe from the evidence such extraordinary floods or rain occasioning such damage occurred in.

3. Unless the jury believe from the evidence that the ditches along the line of defendant's railroad upon its right of way were improperly constructed, and that plaintiff's damages were thereby occasioned, they must find their verdict for defendant.

4. If the jury believe from the evidence that the North Missouri Railroad Company, or its agents, in the year 1866 or 1867, cut a ditch through lands beyond its right of way to Middle Fork, then, although the jury may believe from the evidence that defendant, in the year 1872, purchased said North Missouri Railroad road-bed and right of way, and was the owner and in possession thereof in the years 1874, 1875, 1876 and 1877, they are nevertheless instructed that defendant was and is not authorized or required to fill up or change the construction of said ditch so made by the North Missouri Railroad Company beyond said right of way; and if the jury believe from the evidence that the waters of Middle Fork escaped its banks through such ditch alone, and plaintiff's damages were solely occasioned thereby in said years, then they are in-

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structed that plaintiff cannot recover therefor in this action, and the verdict must be for defendant

5. The North Missouri Railroad Company and the defendant had the right to dig ditches along the line of the railroad, for the purpose of draining their right of way or protecting their road-bed, and might lawfully connect, by suitable ditches, the slough over which the road passed, with the river or creek in question; and if the jury believe from the evidence that the ditches made by the North Missouri Railroad Company in the year 1867 or 1868, within its right of way, were so connected with the river or creek in question as to occasion no damage and were then skillfully made, and if the jury believe from the evidence that they were not afterward deepened or enlarged by said North Missouri Railroad Company or defendant, but that in sole consequence of the action of the waters of said river upon the ditches, they had become enlarged or deepened, and in consequence thereof the waters came in the years 1874, 1875, 1876 and 1877 through said ditches upon the lands of plaintiff and occasioned his damages, then the jury are instructed that plaintiff cannot recover, and the verdict must be for defendant.

6. Unless the jury believe from the evidence that defendant knew, prior to the date of the grievances complained of, or some of them, that the ditches upon its right of way were improperly or negligently constructed, and brought the water upon the land of plaintiff to his damage, or unless they believe from the evidence that prior to the date of said grievances, or some of them, the plaintiff or his agent gave defendant or its authorized agent, notice that his lands were flooded and damaged in consequence of the construction of said ditches upon its right of way, they are instructed that they must find their verdict for defendant.

Defendant prayed the court to instruct the jury as follows, to-wit:

1. If the jury believe from the evidence that in the

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years 1874, 1875, 1876 and 1877, the lands of plaintiff were flooded from the overflowing waters of Middle Fork, escaping from the banks of said stream and spreading out generally over the surrounding country, and were thereby rendered valueless for farming purposes or pasturage, or if they believe from the evidence that said lands were flooded and rendered valueless for pasturage or farming purposes by heavy rains, or if they believe from the evidence that said lands were flooded and rendered valueless as aforesaid by a union of both of said causes, then they are instructed that plaintiff cannot recover, and the verdict must be for defendant.

2. If the jury believe from the evidence that defendant's land was overflowed at the times charged, by waters escaping from the middle fork of the Chariton river, through the ditch on the north side of the railroad, where the same crosses the middle fork of said river, and if the jury further believe that said ditch, where it connects with said middle fork, was dug outside of defendant's right of way, before the 2nd day of January, 1872, and before defendant purchased or became the owner of said railroad, then and in that event the court instructs the jury that defendant had no right and was under no obligation to go outside of said right of way to stop up said ditch or obstruct the flow of water escaping therefrom, and is not responsible for any damage to plaintiff's land occasioned thereby, and the jury will find for defendant.

3. If the jury believe from the evidence that the land of plaintiff would have been flooded in the years 1874, 1875, 1876 and 1877, and the grass destroyed or the lands rendered valueless, independent of the construction of the railroad and ditches, then they are instructed that plaintiff cannot recover, and the verdict must be for defendant.

These instructions were refused. There was a verdict for plaintiff for \$250 damages, and a judgment accordingly, from which defendant has appealed.

If one purchase land from another, on which the latter

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has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable for all damages sustained by another after he has knowledge thereof. *Dickson v. C., R. I. & P. Ry Co.*, 71 Mo. 575; *Pinney v. Berry*, 61 Mo. 359. But if the former owner has erected a nuisance on lands not his own, one purchasing his lands is not liable, either for the erection or continuance of such nuisance. Here, those portions of the ditches dug by the North Missouri Railroad Company, which were on its right of way, could by no possibility have injured the plaintiff's land, if the bank of the creek had not been cut down to let the water from the lake into the creek. But for that connection the ditches dug on defendant's right of way would in proportion to their width and depth, have diminished the quantity of water which would have gone on to plaintiff's land from an overflow of the creek. If the North Missouri Railroad Company, without digging a ditch, had cut down the bank of the stream, precisely as it did where the ditch it dug connected with the stream, the ultimate results to plaintiff's land would have been the same as those he now complains of.

The evidence that this defendant cut down the bank of the creek to erect its bridge, and that, in consequence thereof, the volume of water which ran over plaintiff's land from an overflow of the creek, was increased, was inadmissible, and furnished no ground of recovery. It was not alleged as a cause of action in the petition. The only complaint that contains, relates to the two ditches dug by the North Missouri Railroad Company.

It follows that the second of defendant's refused instructions should have been given, and there is a manifest conflict between the plaintiff's first and defendant's fourth instruction given. The first of plaintiff's instructions, in effect, declares that it was defendant's duty to close the ditch both on its right of way and where it connected with the Chariton river. The fourth for plaintiff instructs the jury that, "if in consequence of ditches which may

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have been cut by the North Missouri Railroad Company, on its right of way, said lands were submerged for a longer period of time, and said lands, in consequence of such length of overflow, were injured, etc., the jury should find for plaintiff such damages as may have occurred to said lands, from said cause, after defendant had notice of such injury.' There was no evidence to support that instruction. No witness testified that the ditches dug on the right of way would have injured plaintiff, but all the evidence proved that the injury was occasioned by those portions of the ditches which were beyond the right of way, and on land never owned by the defendant or the North Missouri Railroad Company. Not only was this the testimony of the witnesses, but the physical facts, which are not in dispute, conclusively demonstrate its truth. The land ascended from the bluff to the bank of the river, and was several feet lower at the foot of the bluff than the bank of the stream. Ditches dug on the right of way to receive the water of the lake and not communicating with the river, so far from increasing, would diminish the amount of water, which in an overflow of the creek would flow on to plaintiff's land.

Brown v. Cayuga & Susq. R. R. Co., 12 N. Y. 487, is not in conflict with the views herein expressed, but only holds what is here conceded, that the successor to the title and possession of property, who omits to abate a nuisance erected thereon, by another, after notice to do so, is liable for the damage caused by its continuance. For the foregoing reasons the judgment is reversed and the cause remanded.

School District No. 1 v. Weber.

SCHOOL DISTRICT No. 1 v. WEBER *et al.*, *Plaintiffs in Error.*

School Taxes: LEGISLATIVE POWER OVER THEM. The distribution of school taxes lies wholly within the control of the legislature, and in the absence of some special provision to the contrary, the law in force when the distribution is made must govern. Hence, where the law in force during the years for which certain school taxes were levied, directed them, when collected, to be distributed according to a certain plan, and before the same were collected the law was changed so as to require all school taxes to be distributed according to a different plan; *Held*, that the latter law must govern in the distribution.

Error to St. Francois Circuit Court.—HON. J. B. ROBINSON,
Judge.

REVERSED.

Smith & Krauthoff and *William Carter* for plaintiffs in error.

HOUGH, J.—On the 25th day of June, 1877, a petition was filed in the St. Francois circuit court on behalf of certain school districts through which the St. Louis, Iron Mountain & Southern Railway runs, asking that a mandamus be issued to the justices of the county court of St. Francois county, compelling them to distribute among said districts certain school taxes collected from said railroad for the years 1871, 1872, 1873, 1874 and 1875, under a levy made in January, 1875. A peremptory writ was awarded by the circuit court, as prayed by the petitioners. The only question presented by the record is whether the said taxes should be distributed among all the school districts in the county, in the proportion which the number of children in each district bears to the whole number of children in said county, as provided by the act of March 31st, 1875, April 28th, 1877, and section 6880 of the Revised Statutes, or whether said taxes should be distributed only among the school districts through which the railroad

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is located in proportion to the enumeration returned in each of said school districts for the several years for which the taxes were collected, as was provided by the laws in force when the taxes should have been levied and collected. Act March 10th, 1871; Act March 24th, 1873. The distribution of school taxes lies wholly within the control of the legislature, and in the absence of some special provision to the contrary, we are of opinion that the act in force when the distribution is made should control. *State v. Holladay*, 70 Mo. 137, and cases there cited. The judgment of the circuit court must, therefore, be reversed. The other judges concur.

SMITH, *Appellant*, v. BUNN.

1. **Homestead.** The right of homestead ceases to exist when the occupant, with a view to acquiring a residence elsewhere and with no fixed purpose of returning, ceases to occupy the premises as a residence. Intention to return, in order to preserve the right, must be formed at the time of removal; in order to restore it when once lost, must be executed by actual resumption of occupancy.
2. ———: CASE ADJUDGED. S. having lost his wife broke up house-keeping, moved his household goods, leased his farm and went elsewhere to live. Several years afterward he re-married and within three weeks died. At the time of his death he was preparing to return to his former home, but had not done so, the tenant being still in possession. *Held*, that his widow was not entitled to homestead.

Appeal from Cape Girardeau Court of Common Pleas.—HON.
HAMILTON G. WILSON, Judge.

REVERSED.

R. Burrett Oliver for appellant.

Wilson Cramer for respondent.

Smith v. Dunn.

HENRY, J.—This is an action of ejectment for eighty acres of land. The plaintiff is sole heir of Isaac Smith, deceased, who it is admitted, died seized of the land, and defendants derive their title from the same source, claiming under a deed executed after the death of Isaac Smith by his second wife, who claimed the land as a homestead. Smith purchased the land in 1858, and lived on it until the death of his first wife, mother of plaintiff, which occurred in 1861 or 1862, as plaintiff's witnesses testified, or in 1864 or 1865, as Mrs. Noble, the second wife, testified, when he broke up housekeeping, moved his household goods from the premises and leased them to one Masterson, who was still occupying the premises when Smith died, which occurred three or five years after the death of his first wife, and within three weeks after his second marriage. He never resided on or occupied the premises after the lease to Masterson, but lived a part of the time with his father-in-law, and a part of the time with Jack Hitt, and, at his death, with David Smith. After his second marriage he was making preparations to move to the premises in question. There is no evidence that he said or did anything indicating, either an intention to abandon his homestead or return to it, when he leased to Masterson, except what may be inferred from the above facts, and the question presented is, did his conduct amount to an abandonment of the homestead? If it did, the judgment must be reversed, otherwise the judgment was for the right party.

In most of the cases in which it has been held that ceasing to occupy the premises was not an abandonment of the homestead, there was evidence of an intention of the occupant to return, either consisting of his declarations to that effect, made at the time of his removal, (*Wiggins v. Chance*, 54 Ill. 175,) or of the retention of apartments in the dwelling-house and storing household goods therein. *Potts v. Davenport*, 79 Ill. 455. Some of the cases go further and hold that, until another homestead is ac-

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quired, the old one is not abandoned, and this was adjudged in *Mills v. Von Boskirk*, 32 Texas 360, although the claimants left the county in 1865, being dissatisfied with it, declaring that they did not know that they would ever return, and the premises were attached in 1867, claimants not having yet returned.

But in *Davis v. Andrews*, 30 Vt. 679, the claimants of a homestead left the premises in October, 1858, and were living in another house, a mile and a half distant from the premises claimed. The plaintiff, Davis, had leased the latter for five years from the 1st of April following, and contemplating a sale of the premises, reserved the right to terminate the lease at the end of one year, in case he should sell within that time. Judge Poland, delivering the opinion of the court, said: "It is not true, that every temporary absence from home, would authorize creditors to take a man's homestead, or authorize him to convey it, to bar the right of his wife, but an abandonment of it as a home, and setting up another, we think, would have that effect. It may frequently become a nice question whether the absence is of such a temporary character and purpose that the home, or domicile, still continues, or whether it is changed to another place, and so lost to the first, or not, but when it is made clear that the residence and home of the family has been changed, the right of homestead in the old residence is changed. It is not enough that the housekeeper may still have the legal possession of the old or former homestead, so that he could maintain trespass for an injury to it. The question is, Does he occupy the homestead, does he live and have his home there?"

In the *Matter of the Estate of John Phelan*, 16 Wis. 80, the facts were that the deceased moved from the premises, in which his widow claimed a homestead, in 1854, and never resided there afterward, but rented them to several tenants and moved to a house on another street in the same town, with a view to doing a better business, but his widow testified that he always claimed the premises

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in controversy as his homestead, and intended to move back again and occupy them as such. The supreme court decided against the widow's claim, and observed that: "When the owner of a house and lot voluntarily removes from it, and takes up another residence in the same town, not from any temporary necessity, for the purpose of repairing the homestead or otherwise, but with a view to the more convenient transaction of business elsewhere, renting the old home to other parties, it can no longer be said to be his homestead, and a vague intention to return perhaps at some future time and reside there again, would not make it such." The court also remarked that: "When the residence was actually changed and the old house rented for hire, the exemption ceased, because the homestead ceased."

Our statute is not materially different from those of the states of Vermont and Wisconsin, in the section which secures to a housekeeper, or head of a family, a homestead. It provides that: "The homestead of every housekeeper, or head of a family, consisting of a dwelling-house, * * * which is, or shall be, used by such housekeeper, or head of a family, as such homestead, shall, together with * * *, be exempt from attachment and execution." Other sections of the statute secure the homestead to the family after the death of its head. There is no homestead right where there has been no occupancy of the premises claimed, and it ceases to exist when the occupant ceases to occupy it as a residence, with a view to acquiring a residence elsewhere, and with no fixed purpose of returning to the former, and when once abandoned, "the intention to return by which the homestead rights are preserved, must be formed at the time the removal occurs. It can have no influence whatever in restoring the right once lost by actual abandonment until executed by an actual resumption of occupancy." Thompson on Homesteads, § 267.

There have been numerous adjudications on the subject

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in our sister states, but it is impossible to harmonize them, and a review of the cases would make this opinion interminable, without adding materially to its value.

The facts here made out a *prima facie* case of abandonment, and in the absence of evidence showing that Isaac Smith's removal from the premises was only temporary, and that he intended to re-occupy them at the expiration of the lease, he must be held to have abandoned them as a homestead. *Austin v. Stanley*, 46 N. H. 51; *Davis v. Andrews*, 30 Vt. 678; *Spaulding v. Crane*, 46 Vt. 298; *Phelan's case*, 16 Wis. 82. The judgment is reversed and the cause remanded. All concur.

ESTES, Appellant, v. REYNOLDS.

Contract: DISAFFIRMANCE FOR FRAUD. The right to disaffirm a contract for fraud, must be exercised promptly, and the disaffirmance must be *in toto*.

Appal from Audrain Circuit Court. — HON. G. PORTER,
Judge.

AFFIRMED.

This was an action for damages for fraud and deceit alleged by plaintiff to have been practiced upon him by defendant in palming off upon him certain township bonds instead of county bonds. The facts as testified to by plaintiff were, in substance, as follows: One Thurmond owed plaintiff \$6,500, for which plaintiff held a deed of trust on Thurmond's farm. Thurmond sold his farm to defendant, who agreed to pay the debt due plaintiff. Defendant offered to pay with Pike county bonds, which plaintiff at first refused, but finally consented to receive. On the 5th of October, 1875, the bonds were delivered, and

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plaintiff, without examining them, put them into an envelope, sealed the envelope and handed it to his sister to keep. Plaintiff did not see the bonds again until June, 1876, when he examined them and discovered that a portion only of them were bonds of Pike county, the rest being bonds of Cuivre township, Pike county, not obligations of the county. This was shortly after the Supreme Court of the United States, in the case of *Harshman v. Bates Co.*, had decided all township bonds to be void. Plaintiff did not notify defendant of his discovery, because, as he testified, he did not consider it his duty to notify defendant that he had perpetrated a fraud. Neither did he at the time offer to return the bonds, because his attorney advised him that this was not necessary. In February, 1877, he did offer to return the township bonds, but not the county bonds. He had sold some of the latter, before he discovered that the bonds were not all county bonds.

Defendant had judgment and plaintiff appealed.

Fagg & Biggs for appellant.

When a party sells one thing and delivers an entirely different one, there is no breach of warranty. It is a non-compliance with the terms of the bargain—a non-supply of the thing bought. If the vendee has paid the purchase money, he may recover it back, not by way of damages, but as money paid without consideration. He may maintain the action without returning or offering to return, because the title to the property has never vested in the vendee, and the vendor has a right to reclaim it any time. But when the identical thing purchased has been delivered, but it is not of the quality or value represented, this presents a different case. The vendee, upon discovering the fraud, would have two remedies: Either to stand by the bargain and sue for damages, or immediately return the property and sue for the purchase money. 2 Smith's Lead. Cas. 27; 2 Schouler Per. Prop., 319, 325, 353, 354,

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606; *Young v. Cole*, 3 Bing. (N. C.) 724; Benj. Sales, 448; Story Sales, 367; *Mullen v. Old Colony R. Co.*, 127 Mass. 86; s. c., 34 Am. Rep. 349; 9 C. L. J. 56; *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womersley*, 4 E. & B. 133; *Rosbrook v. Runals*, 32 Wis. 415; *Loeschigh v. Blun*, 1 Daly 49; *Fenton v. Perkins*, 3 Mo. 23, 144. There was no necessity for a return of the township bonds, because the Supreme Court of the State had held that the law under which they were issued was unconstitutional. Therefore, the bonds were void and worthless. *Barr v. Baker*, 9 Mo. 840; *Murphy v. Gay*, 37 Mo. 536; 2 Schouler Per. Prop., 611; *Paul v. Kenosha*, 22 Wis. 266; *Poulton v. Lattimore*, 9 B. & C. 259; *Perley v. Balch*, 23 Pick. 282; *Dill v. O'Ferrell*, 45 Ind. 268; *Lore v. Oldham*, 22 Ind. 51; *Garland v. Spencer*, 46 Me. 528; *Christy v. Cummins*, 3 McL. 386.

Smith & Robinson for respondent.

SHERWOOD, C. J.—It is fatal to plaintiff's case, that on discovering the alleged fraud and deceit upon which he bases his action, he did not promptly rescind, or offer to rescind the contract, and return or offer to return the property he acquired by reason thereof. And such rescission must be *in toto*. A party cannot affirm a contract in part, and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter. Nor is he permitted to select his own time, consult his own convenience and watch the rise and fall of the market, before exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practiced upon him, such election in order to avail him must have the chief and essential element of promptitude, and he must put the other party in the same situation as he was before the contract was made. All the authorities speak this language. *Jarrett v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171, and cases cited. The facts of this case

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bring it fully within the principles here announced, and as the case was tried in conformity thereto, we affirm the judgment. All concur.

THE STATE *ex rel.* CANTWELL *et al.*, Appellants, v. STARK.

1. **The Texas Cattle Act:** ATTACHMENT BOND: DAMAGES. The obligors in an attachment bond given in a suit brought under the Texas Cattle Act to recover damages allowed by that act, cannot plead the invalidity of the act in avoidance of their liability on the bond.
2. ——— : ——— : MEASURE OF DAMAGES. In an action on such a bond the recovery is not confined to the damages that may have occurred by reason of the attachment, but may include any damages directly occasioned by any process or proceeding in the suit.

Appeal from Cass Circuit Court.—HON. NOAH M. GIVAN,
Judge.

REVERSED.

Bogges, Cravens & Moore, C. W. Sloan and R. T. Railey
for appellants.

Granting that the whole of the Texas cattle law was unconstitutional and void; that the justice had no jurisdiction of the subject matter of the suit on account of the amount involved; that all the process and proceedings had and made by him were void; and that he, the constable, and all concerned therein were trespassers, and still the bond was not void. It was not authorized, required or taken by reason of or pursuant to any provision of the Texas cattle law; hence, was not dependent thereon for its validity, and consequently could not be invalidated thereby. It was made by parties capable in law of making the same and binding themselves by its provisions. It was executed pursuant to section 5, page 182, Wagner's Statutes. It

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was taken by an officer authorized and required to take such a bond, as a condition precedent to issuing a writ of attachment. It was not taken by and to the officer as a consideration for his doing an unlawful act; but to the State as an indemnity to a certain designated class of persons, against the consequences of wrongfully suing out and wielding the writ of attachment. It was voluntarily made by defendants for the purpose aforesaid and needed no consideration for its support. There is no statute which forbids the making or impairs the validity of such bonds. These obligors by means of it obtained the attachment; with that they seized relators' property to their damage, and compelled them, as the only lawful method of regaining the possession to incur the damage and pay the expenses, for which they now sue. Shall defendants escape the legitimate consequences of their wrongful and injurious conduct because they proceeded under an unconstitutional statute and in a court without jurisdiction? *Henoch v. Chaney*, 61 Mo. 129; *Barnes v. Webster*, 16 Mo. 258, 265; *Williams v. Coleman*, 49 Mo. 325; *State v. Thomas*, 17 Mo. 503; *Graves v. McHugh*, 58 Mo. 499; *Henry v. State*, 9 Mo. 769; *State v. Hesselmeyer*, 34 Mo. 76.

Wooldridge & Daniel for respondents.

The supposed law under which the action was commenced before the justice being unconstitutional and void, the justice had no jurisdiction of the subject matter of the action, and no authority to receive, exact or approve the bond sued on. It is, therefore, without any valid consideration and void, and no action can be maintained upon it. *Bayless v. Bank*, 15 Ohio 606, 619; *Benedict v. Bray*, 2 Cal. 251; *State v. Randolph*, 26 Mo. 213; *State v. Ferguson*, 50 Mo. 409; *Adams v. Wilson*, 10 Mo. 341; *Garnet v. Rodgers*, 52 Mo. 145; *Kinsar v. Shands*, 52 Mo. 326; *Moore v. Damon*, 4 Mo. App. 111; *Hessey v. Heitkamp*, 9 Mo. App. 36; *Cooley Const. Lim.*, (4 Ed.) side p. 188; 2 Hilliard on

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Torts, (3 Ed.) p. 189, § 3; *C. & A. R. R. Co. v. Erickson*, 91 Ill. 613; s. c., 33 Am. Rep. 70; *Thompson v. Lockwood*, 15 John. 256; *Cable v. Cooper*, 15 John. 152; *Harris v. Simpson*, 4 Littell 165; *Sherry v. Foresman*, 6 Blackf. 56; *Moore v. Allen*, 3 J. J. Marsh 621; *Homan v. Brinckerhoff*, 1 Denio 184; *Parker v. Henderson*, 1 Ind. 62; *Blackman v. State*, 12 Ind. 556; *Cassell v. Scott*, 17 Ind. 514; *Caffrey v. Dudgeon*, 38 Ind. 512; *Marshall v. State*, 8 Blackf. 162; *State v. Lynch*, 6 Blackf. 190; *Silver v. Governor*, 4 Blackf. 15; *Tarbell v. Gray*, 4 Gray 444; *Green v. Haskell*, 24 Me. 180; *Libby v. Main*, 2 Fairf. 344; *Bridge v. Ford*, 4 Mass. 641; *Barnes v. Whittaker*, 45 Wis. 204; *Dillard v. St. L., K. C. & N. R'y Co.*, 58 Mo. 69; Freeman on Executions, § 100 and note; *Byers v. State*, 20 Ind. 47; *Germond v. People*, 1 Hill 343; *Perry v. Henley*, 14 B. Mon. 474; *Buckingham v. Bailey*, 4 Sm. & M. 538; *Olds v. State*, 6 Blackf. 91; *Willey v. Strickland*, 8 Ind. 453; *Gregg v. Wooden*, 7 Ind. 499; *Ohio, etc., R. R. Co. v. Hanna*, 6 Ind. 391; *Wilson v. Hobday*, 4 M. & S. 121; *Myers v. State*, 19 Ind. 127; *Macey v. Titcomb*, 19 Ind. 135.

HENRY, J.—This is a suit on an attachment bond executed by defendants in an attachment proceeding instituted by Stark and Merriott against relators, before a justice of the peace in Bates county, to recover \$800 damages to stock of said Stark and Merriott, by reason of the communication of the Texas or Spanish fever to said cattle, by Texas, Mexican or Indian cattle, unlawfully brought into this State by said relators. The attachment bond contained the statutory stipulations, and on the trial in the circuit court, to which the cause was appealed, that court held that relators could not maintain an action on the bond, because the act under which the principal suit was prosecuted, and in which the bond was given, was unconstitutional and void.

That act has been declared void by the Supreme Court of the United States, and its decision has been followed by

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this court in several recent cases. *Gilmore v. R'y Co.*, 67 Mo. 323; *McAllister v. Chicago & R. I. R. Co.*, 74 Mo. 352; *Railway Co. v. Husen*, 95 U. S. 465; *Urton v. Sherlock*, ante, p. 247. In the last of these cases it was held that the entire act is a nullity. Many cases have been cited by respondents' counsel in support of the ruling of the circuit court. *Benedict v. Bray*, 2 Cal. 254, and numerous cases decided by the supreme court of Indiana, are to that effect; but in *McDermott v. Isbell*, 4 Cal. 114, the court observed: "It has been frequently held by this court that a party who avails himself of the process of an inferior court, cannot escape the responsibility of his own act, upon the ground that such tribunal had no jurisdiction over the subject matter in controversy. Consequently a party who sues out a writ of replevin from a justice of the peace having no jurisdiction, and obtains the property in an action on the replevin bond cannot set up as a defense the want of jurisdiction of the justice." In *Caffrey v. Dudgeon*, 38 Ind. 516, the court remarks that: "It is the settled law of this state, that where a bond or recognizance is taken by an officer or court acting simply under statutory power, the instrument taken must be authorized by the statute, or it will be void, and in suing upon such an instrument, the complaint must set out the facts showing that the bond or recognizance was taken in a case where the law authorized it; and in many cases, it must appear that it was taken exactly or substantially in accordance with the statutory power." Such, however, is not the doctrine on that subject in this State, and the adjudications in Indiana are, therefore, not applicable. *Henoch v. Chaney*, 61 Mo. 129. Nor are those cases, cited from our own reports, in which an appeal bond, filed out of time, has been held to impose no liability upon the makers, in point. There, no substantial benefit is secured by the appellant by means of the bond. Here, by means of the attachment bond, the plaintiffs in that suit obtained possession of relators' property, and we are utterly unable on principle to

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distinguish between this and a replevin suit instituted in a justice's court, of which that court has no jurisdiction, in which, by virtue of the bond, the plaintiff gets possession of the property sued for. We are aware of a conflict of authority on the subject, but are inclined to adhere to the decisions of this court in cases analogous to this, and believe the more reasonable doctrine to be that which holds the bondsman responsible under the facts here presented.

The conditions of the bond are that plaintiffs "shall prosecute their action without delay and with effect, *

* and pay all damages that may accrue to any defendant or garnishee by reason of the attachment or any process or proceeding in the suit, or by reason of any judgment or process thereon." The plaintiffs are not confined in their recovery to damages that may have accrued by reason of the attachment, but by the express terms of the bond, they are entitled also to recover for any damages directly occasioned by any process or proceeding in the suit.

The judgment is reversed and the cause remanded.
All concur.

THE STATE V. DIECKMANN, *Appellant*.

Judgment affirmed for reasons given by the St. Louis court of appeals.
See 11 Mo. App. 538.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

M. F. Taylor for appellant.

D. H. McIntyre, Attorney General, and *John R. War-*

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field, Prosecuting Attorney of St. Louis County, for the State.

NORTON, J.—This case is before us on defendant's appeal from the judgment of the St. Louis court of appeals affirming the judgment of the circuit court of St. Louis county sentencing defendant to imprisonment in the penitentiary for twenty years, he having been tried in said court and found guilty of murder in the second degree for killing Henry W. Mertz. We find the alleged errors relied upon by counsel for reversal of the judgment to be the same relied upon when the cause was before the St. Louis court of appeals, and after having carefully considered them, are entirely satisfied with the correctness of the ruling of said court upon each and all of them, and for the reasons given in the opinion of said court delivered by Thompson, J., hereby affirm the judgment, in which all concur.

THE STATE, *Appellant*, v. FITZGERALD.

1. **Bigamy**: JURISDICTION. An indictment for bigamy, when the unlawful marriage was contracted in this State, is cognizable only in the courts of the county where it was contracted, not where the parties may have afterward cohabited.
2. **Criminal Law**: APPREHENSION OF OFFENDER, AS GROUND OF JURISDICTION. Where the apprehension of an offender is made a ground of jurisdiction, the apprehension must have occurred prior to the finding of the indictment and must be alleged in the indictment.

Appeal from Gasconade Circuit Court.—HON. A. J. SEAY,
Judge.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

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Parker, Clement & Neuenhahn for respondent.

HOUGH, J.—The defendant was indicted in the county of Gasconade for the crime of bigamy, charged to have been committed by marrying one Jackson Hughes, who, it is averred, had at the time a lawful wife living. The unlawful marriage is charged to have been contracted in the county of Maries, and the defendant is also charged in the same count with having cohabited with the said Hughes in the county of Gasconade.

Cohabitation within this State, by persons unlawfully married, does not of itself constitute the commission of the crime of bigamy in the county where such cohabitation takes place, unless the second unlawful marriage was contracted or solemnized without this State. Section 1535 of the Revised Statutes, is as follows: "Every person having a husband or wife living, who shall marry another person without this State, in any case where such marriage would be punishable if contracted or solemnized within this State, and shall afterward cohabit with such other person within this State, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this State." This section can have no application to the defendant, for the additional reason, that she is charged to have been unmarried when she intermarried with Hughes. The allegation of cohabitation, therefore, charges no offense under the statute against bigamy.

The circuit court of Gasconade county had no jurisdiction to try the defendant for the crime charged by reason of the fact that she was apprehended in that county. When the apprehension of the offender is made a ground of jurisdiction, under section 1536 of the Revised Statutes, such apprehension must have occurred prior to the finding of the indictment, and must be alleged in the indictment. *State v. Griswald*, 53 Mo. 181.

1. BIGAMY: jurisdiction.

2. CRIMINAL LAW: apprehension of offender, as ground of jurisdiction.

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It is unnecessary to notice other objections to the indictment.

The defendant having been indicted in a county other than that in which the crime charged is alleged to have been committed, the judgment of the circuit court sustaining the demurrer to the indictment will be affirmed. *Ex parte Slater*, 72 Mo. 102; *State v. Hiram Wells*.* The other judges concur.

HUGHES, *Plaintiff in Error*, v. LITRELL.

Fraudulent Conveyances: STATUTE OF LIMITATIONS. As to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations begins to run from the time the fraudulent deed is recorded, or from the time the creditor has actual notice of the conveyance, whichever first occurs. *Rogers v. Brown*, 61 Mo. 187.

Error to Johnson Circuit Court.

AFFIRMED.

John J. Cockrell for plaintiff in error.

In an action attacking a fraudulent conveyance of land, section 3219, Revised Statutes 1879, applies. *Hunter v. Hunter*, 50 Mo. 445; *Rogers v. Brown*, 61 Mo. 190; *Bobb v. Woodward*, 50 Mo. 103. The statute of limitations in favor of a fraudulent grantee only commences to run from date of possession under fraudulent grant. *Walker v. Bacon*, 32 Mo. 144; *Bobb v. Woodward*, 50 Mo. 95. These cases are not overruled by *Rogers v. Brown*. Possession under this statute must be adverse and hostile to the real

*Decided March 25th, 1881, but not furnished the reporter for publication.

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owner. *Hamilton v. Boggess*, 63 Mo. 233; *Lynde v. Williams*, 68 Mo. 360; *Norfleet v. Hutchins*, 68 Mo. 597. We claim under the husband and seek to subject his title to our judgment. The petition shows issue of the marriage. Then, as long as the husband lived he had a life tenancy in the land as against his wife, whether the conveyance to her was a fraud or not. *Dyer v. Brannock*, 66 Mo. 422. Hence her possession could not be adverse to him or those claiming under him till after his death, and as the only statute which applies to this action is section 3219, Revised Statutes 1879, plaintiffs' action cannot be barred until defendants have shown ten years' actual adverse possession.

O. L. Houts for defendant in error, cited *Gillespie v. Stone*, 70 Mo. 505; *Rogers v. Brown*, 61 Mo. 187.

NORTON, J.—In this case the petition of plaintiff states in substance, that Robert Littrell became indebted to plaintiff in 1857 by his promissory note, in the sum of \$338.10; that said Littrell died insolvent in 1873, that plaintiff presented said note for allowance against his estate, and there was allowed him thereon the sum of \$764.58; that said Littrell, on the 23rd day of April, 1866, for the purpose of defrauding his creditors, caused a deed to be made conveying certain real estate described in the petition to his wife Matilda and one of the defendants in this suit, which was duly recorded in 1866 in the office of the recorder of deeds for Johnson county; that said Littrell, on the 1st day of June, 1866, for the purpose of defrauding his creditors, caused another deed to be executed conveying to his said wife Matilda certain other lands described in the petition, which said deed was duly recorded on the 9th day of February, 1867. The prayer of the petition is, that said Matilda be declared to hold said real estate in trust for plaintiff, and that a decree be entered ordering it to be sold and the proceeds applied to the payment of said debt. Defendant demurred to the petition on the ground

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that it showed upon its face that the suit was not brought within ten years after plaintiff's cause of action occurred, and that his action was, therefore, barred by the statute of limitations. The court sustained the demurrer and entered judgment for defendant, and it is this action of the court which plaintiff, who brings the case before us on writ of error, assigns as error.

The case of *Rogers v. Brown*, 61 Mo. 187, is decisive of the point presented; it having been held in that case that as to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations begins to run from the time the alleged fraudulent deed was recorded or from the time the creditor had actual notice of the conveyance, whichever first occurred. It was also held that the case of *Hunter v. Hunter*, 50 Mo. 445, to which plaintiff's counsel has cited us, has no application to such a case as the above. It appears from the petition that one of the alleged fraudulent deeds was recorded in 1866, and the other in February, 1867, and that the suit of plaintiff was not commenced till January 18th, 1878. The action of the court in sustaining the demurrer was, therefore, proper and the judgment is hereby affirmed, in which all concur.

YARNALL V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

1. **Instructions as to Negligence.** In an action grounded upon negligence, the better practice is for the court, by appropriate instructions applicable to the facts in evidence in the case, to tell the jury whether these facts, if they find them to exist, do or do not constitute negligence. An instruction is erroneous which leaves the whole question of negligence to the jury without any qualification whatever.
2. **Plaintiff's Contributory Negligence: DEFENDANT'S NEGLIGENCE**

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When the plaintiff is guilty of contributory negligence, the defendant will be liable only for such negligence on his part as occurred after he became aware of plaintiff's exposed condition. See *Swigert v. Hann. & St. Jo. R. R. Co.*, ante, p. 475.

3. **Railroads: PEDESTRIANS ON THE TRACK.** The servants of a railroad company operating its trains in the country at night have a right to assume that the track is clear, and are under no obligations to provide for the safety of persons who may be on it. Even if they know the track is used as a foot-path, this will not exonerate any one so using it from the duty of taking proper care to avoid injury.
4. **The Evidence** in this case shows the plaintiff's husband, for the killing of whom this action was brought, to have been guilty of gross negligence directly contributing to his death and forbidding plaintiff's recovery.

Appeal from Clay Circuit Court.—HON. GEORGE W. DUNN,
Judge.

REVERSED.

Wells H. Blodgett for appellant.

J. E. Black, James W. Black, James L. Farris and *Adam J. Barr* for respondent.

RAY, J.—This action was commenced by plaintiff, as the widow of Richard Yarnall, under the 2nd section of the Damage Act, to recover the statutory penalty of \$5,000 for causing the death of her husband.

The material parts of the petition are as follows, to-wit: That defendant was a railway corporation duly organized under the laws of the State of Missouri; that defendant was, on the 2nd day of July, 1875, owning, controlling and operating a railroad known as the St. Joseph & St. Louis Railroad, which began at a point in Ray county, opposite the city Lexington, and extended through the county of Ray to the city of St. Joseph. The petition also contained the following averments: "That on the 2nd day of July, 1875, defendant, by its agents and employes, negligently and unskillfully did back one of its locomotives

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tives, with a tender in advance, from Richmond to Richmond and Lexington Junction, in Ray county; that, by reason of negligence and unskillfulness of the agents and employes of defendant, at the time aforesaid, and at a point on the railroad aforesaid about one-half mile north of the Richmond and Lexington Junction, in Ray county, in running its said locomotive and tender as aforesaid, the said Richard Yarnall was struck, run upon and over by said tender and locomotive, and bruised, wounded and mangled and instantly killed thereby." The petition also averred that the plaintiff was the widow of Richard Yarnall, deceased, and prayed for judgment in the sum of \$5,000.

The defendant, in its answer, denied that it did, on or about the 2nd day of July, 1875, by its agents, servants or otherwise, negligently or unskillfully back a locomotive and tender from Richmond to Richmond and Lexington Junction in Ray county; denied that, by reason of negligence or unskillfulness on the part of its agents or employes, the said Richard Yarnall was, at a point about a half mile north of said Junction, run upon or over by defendant's locomotive or tender and thereby killed. For other and further answer, defendant stated that deceased was, at the time of his death, wrongfully upon defendant's track; that he was not in the exercise of prudence to avoid danger; that the point where he was alleged to have been killed was in the country, and not in the street of a town or city, or at the crossing of a public highway; that said Yarnall was guilty of such negligence as was the proximate cause of his death; and denied that the death of Yarnall was caused by his being run over by any locomotive or tender of defendant on its railroad.

The replication denied the new matter set up in the answer.

The testimony, together with the admissions made upon the trial, show that in the year 1875 defendant was operating a railroad commencing at a point in Ray county

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known as North Lexington, and extending in a north-westerly direction to the city of St. Joseph in Buchanan county; that on the line of the above named railroad and some nine or ten miles northwest of North Lexington, is situated the town of Richmond in Ray county, and that about midway between North Lexington and Richmond the railroad to St. Joseph is crossed by the main line of defendant's railroad, which extends from St. Louis to Kansas City. At the point where said tracks cross each other there is a depot and a village known as Richmond and Lexington Junction. North of Richmond and Lexington Junction, some two and a half miles up the track, in the direction of Richmond, there were some coal mines, in which Richard Yarnall, the deceased, worked as a miner, and near which he resided and kept a boarding house.

From the testimony introduced on both sides at the trial, it appears that during the afternoon of July 2nd, 1875, the deceased was about the Junction drinking beer, and that toward evening he started up the railroad track, toward his home, in a state of intoxication, carrying on his back a sack containing some meat and groceries. As he started off up the track toward home, he was seen to stagger, and before it got fully dark he was seen for the last time half a mile up from the Junction, still going in a northerly direction, and at that time he seemed to be having some trouble in keeping the sack on his shoulder. On the same night after nine o'clock, the dead body of Yarnall was found between the rails of the railroad track, half a mile north of where he was last seen. The body when found had the appearance of having been run over by the cars, and was lying between the rails, near where the defendant's track was at that time crossed by a sort of neighborhood road leading in the direction of a mill and the coal mines. From the blood and other marks upon the ground, ties and iron rails, it was evident that the deceased had been struck some distance north of the crossing, and that

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the body had been dragged or rolled along down to the crossing, where it was found.

In backing down, the head-light at the front of the engine was burning brightly. The gauge lights in the cab were lighted and a watchman sat on the rear end of the tender, holding in his hand as a signal, what is known as a white light, or common railroad lantern. The testimony shows that the rays reflected to the sides of the track from the head-light of the engine, the gauge lights in the cab and the lantern at the rear, could each be seen by a person upon the track (if he looked) a quarter of a mile; and that the noise of an engine and tender running on a track in the night-time, could be heard a much greater distance.

The circumstances all indicated that the deceased was struck by an engine or train going south from Richmond to the Junction. Blood and brains were to be seen upon the rails and upon some piles of ties which were near the track, but no blood or marks of any kind could be found upon the wheels or other portions of the engine that was backed down on the night in question from Richmond to the Junction. No one upon that engine saw anything upon the track, felt any unusual jar, or was aware of an injury to any person until after the body was discovered, and they learned of the accident hours afterward from persons at the Junction. It was not only established by the evidence of witnesses introduced by both parties, that the deceased was drunk when he left the Junction and started up the railroad track toward his home on the evening of his death; but it was also shown that he was in the habit of getting drunk and sitting down or lying down upon the street, sidewalk or railroad track, wherever he might, at the time, happen to be.

At the close of plaintiff's testimony, defendant interposed a demurrer to the evidence, but the court overruled it and defendant excepted. At the close of the whole testimony the court, over defendant's objection, gave the following instructions for the plaintiff:

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1. If the jury believe from the evidence that, on the 2nd day of July, 1875, Richard Yarnall was run over and killed by the locomotive and tender of defendant upon the St. Louis & St. Joseph Railroad, while said railroad was run and operated by defendant, in Ray county, by reason of negligence or unskillfulness of the agents, servants or employes of defendant in running and managing said locomotive and tender, and further find that plaintiff is the widow of said Yarnall, then the verdict should be for the plaintiff, unless Yarnall was at the time guilty of negligence which contributed to or caused his death.

2. Although the jury believe from the evidence that Yarnall was guilty of negligence at the time he was killed, by being upon the railroad of defendant; yet if they further believe that the agents, servants or employes of defendant, by the exercise of care and skill, could have prevented the killing of said Yarnall, and that his death was caused by the carelessness, negligence or unskillfulness of defendant's agents, servants or employes, and that plaintiff is his widow, the verdict should be for plaintiff.

3. If the jury find the issues for plaintiff, they will assess the damages at \$5,000.

The court gave the following instructions for defendant, to-wit :

1. Defendant had the right to the exclusive use of its own railway track, to run and operate its cars, engines and locomotives thereon at any time, either in the day or nighttime, and either backwards or forwards, and if the jury find from the evidence that the employes of defendant used ordinary care in backing its engine and tender at the time, and along the track where the injury complained of occurred, then the jury must find for defendant.

2. The burden of proof is on the plaintiff, and to entitle her to recover she must prove to the satisfaction of the jury, by the preponderance of the evidence, that her husband was killed by the negligence or unskillfulness of the employes of defendant in running and managing the locomotive of defendant, and that he was not at the time

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guilty of any negligence which directly contributed to the cause of his death.

3. Although the jury may believe from the evidence that the persons in the charge of defendant's engine were guilty of negligence in running said engine, yet if they further believe from the evidence that Yarnall was guilty of any negligence that directly contributed to produce his death, then plaintiff cannot recover.

Among other instructions asked by defendant, and refused by the court, are the following, to-wit:

4. Under the pleadings and evidence, plaintiff is not entitled to recover, and the finding must be for defendant.

5. Defendant had the legal right to the use of its own track, and the right to run and operate its locomotives and cars thereon, at any time either in the day or night-time, and either backwards or forwards, and the employees of defendant were under no obligations to presume that any person would be on said track at the time and place where said killing occurred, and if the jury find from the evidence that Yarnall, while intoxicated, was on the track of defendant's road, either walking, sitting or lying on said track, and that he was not seen by those operating the train, in time to avoid the injury, then the jury must find for defendant.

6. If the jury believe from the evidence that from the point on defendant's track, where Yarnall was run over, there was a plain view of the approaching engine and tender, and that, by the exercise of ordinary care and prudence, he might have seen or heard said engine and tender approaching, and could by ordinary care and prudence have avoided said engine and tender, then the jury must find for defendant. The ordinary care and prudence required of Yarnall was the exercise of such care and prudence as was proportioned to the danger to be avoided.

12. If the jury believe from the evidence that Yarnall was, a short time before he was killed, in a state of intoxication, and in such a condition went upon defend-

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ant's railway track for the purpose of walking home thereon, and laid himself down or fell down upon the track, and was run over and killed by the engine or tender, then they must find their verdict for defendant, unless they further find from the evidence that defendant or its servants in charge of the engine and tender, had knowledge that he was on the track in time to prevent the accident.

13. Although the jury may believe from the evidence that coal miners and parties in the neighborhood were in the habit of walking along defendant's track at the place of the accident, and that defendant or its servants were aware of that fact, the plaintiff's husband, nevertheless, had no right to walk thereon, and if the jury believe from the evidence that Yarnall had gone on defendant's railway track for the purpose of walking home thereon, then they are instructed that while on the track it was his duty to vigilantly employ his senses in looking out for the approach of engines and cars, and if the jury believe from the evidence that while on the track he failed to use his senses in looking out for the engine and cars, and in consequence of such failure to use his senses he was run over and killed, then they are instructed that the plaintiff cannot recover, and the verdict must be for defendant.

The defendant duly excepted to the refusal of these instructions.

Under the instructions given the jury found for plaintiff and assessed damages at \$5,000. After an unsuccessful motion for a new trial, the defendant brings the case here by appeal.

As the decision of this case, from the view we have taken of it, depends upon the action of the court in giving the first and second instructions for the plaintiff; but more especially in refusing the fifth and twelfth and the sixth and thirteenth instructions asked by the defendant, we deem it unnecessary to notice the other instructions and rulings of the court; or to give any fuller statement of the

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evidence, than as stated above; or as may appear in the progress of this opinion.

Conceding that the first and second instructions for plaintiff, where there was sufficient evidence in the cause on which to base them, might be proper enough as far as they go; but taken by themselves, they are subject to the objection of referring the whole question of negligence, or care, entirely to the jury, without any qualification whatever as to what constitutes negligence or care in the given case. What constitutes negligence or care, as we all know, is a question of law for the court. Whether it exists in the given case is a question of fact for the jury. Usually, and especially in a case like this, it is believed to be the better practice for the court, by appropriate instructions, applicable to the particular facts of the case in evidence and on trial, to tell the jury whether these facts, if they believe them to exist, do or do not amount to negligence or care.

It is proper also, here to remark, that the second instruction for plaintiff is erroneous for another reason, to-wit: The defendant's liability should have been limited to negligence or want of care after its servants became aware of Yarnall's exposed position, if indeed they did so become aware of his exposure to danger.

Whether there was sufficient evidence in this cause, on which to base these instructions, we think extremely doubtful; but conceding that there was, we are clear that they should at least have been qualified and explained by the fifth and twelfth and the sixth and thirteenth instructions asked by the defendant, or the substance of them; and that their refusal was manifest error. They announce the true doctrine applicable to a case like this, and are fully sustained by numerous decisions of this court heretofore made, to say nothing of the adjudications of other courts on the same subject. *Maher v. A. & P. Ry Co.*, 64 Mo. 267; *Zimmerman v. Hann. & St. Jo. R. R. Co.*, 71 Mo. 476;

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Isabel v. Hann. & St. Jo. R. R. Co., 60 Mo. 475; *Hallihan v. Hann. & St. Jo. R. R. Co.*, 71 Mo. 113; *Karle v. K. C., St. Jo. & C. B. R. R. Co.*, 55 Mo. 476; *Fletcher v. A. & P. R'y Co.*, 64 Mo. 484; *Harlan v. St. L., K. C. & N. R'y Co.*, 65 Mo. 22; *Harlan v. St. L., K. C. & N. R'y Co.*, 64 Mo. 480; *Hicks v. Mo. Pac. R'y Co.*, 65 Mo. 34. This accident occurred in the open country, where the defendant had the exclusive right of way, and was under no obligation to anticipate the presence of any one, or provide for their safety. It happened also in the night time, and the evidence wholly fails to show how it took place, or by which of the trains the deceased was run over and killed: or in what particular, if any, the defendant was negligent.

But concede that the defendant may have been guilty of negligence in some particular, yet there is abundant evidence that the plaintiff's husband was guilty of gross negligence directly contributing to his death; and in all such cases it is clear that no recovery can be had. The above authorities abundantly sustain this position.

Concede also, that the evidence shows that the coal miners and others were in the habit of walking on defendant's track between Richmond and Lexington Junction, and the coal mines, where this accident occurred, and that the defendant's agents were aware of that fact, still, that fact, if so, would not exonerate the plaintiff's husband, while walking on said track, from the duty of exercising proper care to avoid the injury; and if he failed to do so, and thereby directly contributed to his death, no recovery can be had.

The testimony shows that defendant's trains, regular, special and extra, were accustomed to run backward and forward over its track between the Junction and Richmond, at almost all hours during the day and night; that two or three regular trains passed over the same every evening at intervals between six and nine o'clock; and that the engine and tender, also, were accustomed to pass and repass very frequently of nights for re-

3. NEGLIGENCE:
pedestrians on the
track.

4. THE EVIDENCE.

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pairs and otherwise. It also appears that the deceased, for some considerable time, had lived at the coal mines, and was accustomed to pass and repass, up and down said road between the two places, and was presumably familiar with these facts, and this state of things. The testimony further shows that the deceased, on the evening of the accident and just before most of the regular trains for that evening were due and expected, in a state of intoxication, and staggering, started up the railroad track; and that, at the place where his dead body was found about half-after nine o'clock that night, the railroad was both straight and level for at least a quarter of a mile, both ways; and that there was nothing to prevent deceased from seeing or hearing an approaching train, or to prevent him from getting off the track in time to avoid injury, if he had been sober, or awake, or in the exercise of ordinary care for his personal safety. Under such circumstances, the conclusion is almost irresistible, that the deceased from extreme drunkenness, had either fallen or laid down on the track in a state of stupor or drowsiness, and was thus run over and killed by some one of the passing trains, without having been seen in the darkness by those in charge of the train. Under such circumstances it is difficult to see how the defendant can be charged with negligence; whilst it is quite evident that the deceased was manifestly guilty of such contributory negligence as will prevent a recovery.

It may here be remarked, also, that the views herein expressed are not in conflict with those contained in the recent case of *Lulu Frick v. St. L., K. C. & N. Ry Co.*, decided by this court at the October term, 1881.* There the accident occurred in broadday-light, in the suburbs of a crowded city, where care and caution, proportionate to the apprehension of danger, is held to be required; and the plaintiff therein was an infant, to whom contributory negligence is not imputable. Here, the injury happened

*See *post*, p. 595.

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in the night-time and in the open country, where the defendant had the exclusive right of way, and was under no obligation to anticipate the presence of any one, or to provide for their safety; and the injured party therein is an adult, who is shown by the testimony to have been guilty of gross negligence, contributing directly to his death. The two cases being thus essentially different, in all the elements of time, place and circumstances, as well as in the character and capacity of the sufferers, or actors therein, have been deemed and held to confer different rights, and impose different obligations, and, therefore, governable by different rules, as indicated in the two opinions. For the reasons above stated, the judgment of the trial court is reversed. All concur.

THE STATE V. EATON, *Appellant*.

1. **Pendency of Former Indictment.** The pendency of a former indictment for the same offense is no bar to the second indictment. R. S. 1879, § 1808. Overruling *State v. Smith*, 71 Mo. 45.
2. **Murder in the Second Degree.** When the circumstances of deliberation and malice are not proved, the law will only presume a homicide to be murder in the second degree.
3. **MURDER: DELIBERATION.** An instruction that "deliberation" means "in a cool state of the blood, that is, not in a state of mental excitement, caused by lawful provocation;" *Held*, error. See *State v. Curtis*, 70 Mo. 594.
4. — : **SELF-DEFENSE.** To justify a homicide on the ground of self-defense, it is sufficient to show an apparent danger affording a reasonable ground for apprehension on the part of the slayer that unless he kill or disable his adversary, his own life or limbs are in imminent peril.
5. — : **THREATS.** One whose life has been threatened is not bound to wait, before he begins to defend himself, for personal violence or an assault made upon him. On the other hand, he has no right to hunt up the threatener and slay him, or to take his life at all unless

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the threatener, when they meet, by his conduct manifests a purpose to carry the threat into execution.

6. **Criminal Law: WITNESSES.** The State is not bound to call as witnesses all the persons who are cognizant of a criminal transaction. See *State v. Kilgore*, 70 Mo. 546.
7. **Practice, Criminal: CLERICAL ERROR IN INDICTMENT.** An indictment for murder charged that defendant wounded deceased on the 30th of August, and that in consequence thereof deceased languished "until the 1st of September, on which day of August in the same year he died." *Held*, that the insertion of the word August, where it last appears was manifestly a clerical error, and not a sufficient ground for arresting the judgment.

Appeal from Benton Circuit Court.—HON. F. P. WRIGHT,
Judge.

REVERSED.

M. A. Fyke for appellant.

D. H. McIntyre, Attorney General, for the State.

HENRY, J.—The defendant was indicted at the October term, 1878, of the Benton circuit court for the murder of James S. Hatler, on the 26th of August, 1878. He was arrested under that indictment and admitted to bail September 11th, 1879. At the ensuing October term of said court a second indictment was found against him for the same offense, charging the shooting to have been done on the 30th day of August, 1878, and that Hatler's death resulted from it on the 1st day of September, 1878. He was arraigned at the October term, 1879, and pleaded not guilty, but there was a mis-trial. He was tried again at the May term, 1880, and found guilty of murder in the second degree, and his punishment assessed at fifteen years in the penitentiary. From the judgment thereon he has appealed.

No notice was taken of the fact that an indictment against him for the same offense was preferred by the grand jury at the October term, 1878,

1. PENDENCY OF
FORMER INDICT-
MENT.

until defendant filed his motion for a new trial, in which one of the grounds relied upon was that there was "a former indictment pending against him in this court, found at a former term, for the same offense, which was not quashed prior to the time defendant was put upon trial herein, but the same was, and still is, pending." This motion was overruled and this is the principal question discussed by defendant's counsel in his oral argument. The *State v. Smith*, 71 Mo. 45, and the *State v. Webb*, 74 Mo. 333, are relied upon by him. The *State v. Smith* is directly in point and sustains his position, and in the *State v. Webb*, although this question was not carefully considered, and its decision was not necessary to the determination of the cause, this doctrine of the *State v. Smith*, was incidentally recognized. But a more careful consideration of the subject has brought us to the conclusion that the doctrine announced in the *State v. Smith*, and recognized in the *State v. Webb*, is not maintainable, either on reason or authority. No authority is cited in the *State v. Smith*, in support of this doctrine, and, as we are of the opinion that it is erroneous, avail ourselves of the earliest opportunity to correct it.

Section 1808 of the Revised Statutes provides that: "If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment and shall be quashed." The statute of New York is identical with ours, except that, where the word "suspended" occurs in ours, the word "superseded" is employed in the New York statute.

In *Austin v. State*, 12 Mo. 394, the court, commenting on section 4, page 867, of the Revised Statutes, identical with section 1808 of the present revision, said: "This statute is the law that must govern in this case, and I must examine the defendant's plea by this statute. A plea under this statute should state that the indictment pleaded to was the one which was first found, and should state that

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the offense charged in the two indictments is not only the same offense, but is the same matter, the same transaction, the *una et eadem res acta*." The statute suspends the first indictment, and declares that it shall be quashed. There could, therefore, be no prosecution under that indictment, because the finding of the second indictment suspends it. There could be no good plea to the second indictment, based on the fact that another had been previously preferred that had not been quashed. This was expressly ruled in *Austin v. The State*, *supra*. There is nothing in the section to impair, in any manner whatever, the second indictment. Certainly a plea to the jurisdiction could not be maintained. The court does not lose jurisdiction of the cause, because a former indictment, unquashed, was preferred. The right of the State to find a second indictment against the accused for the same offense, is distinctly recognized by the statute. The accused may have the first quashed. The court might, without any motion filed by him for that purpose, quash the first indictment, but whether it is quashed or not, is a matter of no consequence in the prosecution on the second indictment.

In the *People v. Fisher*, 14 Wend. 9, the same question was raised on that section of the New York statute above noticed, and Savage, C. J., said: "We have the authority of Hawkins for saying that a plea of a former indictment pending for the same offense, is bad, and by our Revised Statutes, the first indictment is superseded by the second, and liable to be quashed. It is not, therefore, a bar to such second indictment." For these reasons, and on the foregoing authorities, we are constrained to overrule the *State v. Smith*, and so much of the *State v. Webb* as sanctions it.

The evidence on the trial of the accused was conflicting. On the part of the State, it tended to prove that the defendant was in a store-house in the town of Fairfield, and through the store window saw deceased passing along the street, and, stepping to the door, called to the deceased to "throw up his hands," and instantly shot him, inflicting

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the wounds of which he died. The evidence on the part of the defense, tended to prove that about a week previous to the tragedy at Fairfield, the deceased and defendant had a difficulty, and deceased, in the language of witnesses, "Got the drop on defendant," and made him hold up his hands; that deceased had made threats against defendant's life repeatedly after the previous difficulty; that about thirty minutes before he was shot, he was seen capping his pistol, which, when he was shot, was in plain view, at his side in the waist of his pantaloons, he having on neither coat nor vest. One witness testified (a brother of defendant) that deceased drew his pistol before defendant fired, and another that he attempted to draw it, and another that he had one hand on the handle, and with the other was holding the barrel of the pistol. No witness testified to the communication to defendant of any threat against him by the deceased. The nearest approach to a communication of any threat made by deceased, is to be found in the testimony of Creed Moore, which was that at the mill in Fairfield, on the day of the shooting, he said to defendant, "Look out." Defendant inquired "Why?" Witness said: "You may get hurt." Hatler's name was not mentioned, and if defendant had at that time heard no threats made by the deceased, there was nothing to connect Hatler's in his mind with the warning given by Moore, except that he and defendant had had a difficulty a week before. There was also evidence that Hatler was a quarrelsome, turbulent and dangerous man. The defendant's brother and other witnesses testified that they saw deceased putting caps on his pistol, about a half hour before he was shot, and yet neither of them communicated that fact to defendant.

The court instructed the jury on murder in the first and second degree, and manslaughter. The court correctly defined murder in the second degree to be

2. MURDER IN THE SECOND DEGREE. "the willful, felonious and premeditated killing of a human being, with malice aforethought, but without deliberation," as these terms, "willful," "felonious,"

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"premeditated" and "deliberation," are defined in the first instruction given for the State; and in the same instruction told the jury, "that when the circumstances of deliberation and malice are not proved, the law will only presume the killing to be murder in the second degree." Of the latter clause of the instruction, defendant's counsel complains, alleging that it dispenses with proof of deliberation and malice, and declares that the law presumes them. Deliberation is out of the question, as the jury, by their verdict, found there was none; and we think the instruction not open to the criticisms made upon it. The meaning is obvious, that in the absence of proof of express malice the law presumes it from the intentional use of a deadly weapon, as declared in a previous instruction.

The court, however, in its first instruction incorrectly defined the word "deliberation" to mean "in a cool state of the blood, that is, not in a state of mental excitement, caused by lawful provocation," etc. *State v. Wieners*, 66 Mo. 13; *State v. Curtis*, 70 Mo. 594.

The instruction given by the court on the theory of self-defense, correctly told the jury: "If defendant had reasonable cause to apprehend a design on the part of deceased to do him some great personal injury, and there was reasonable cause to apprehend immediate danger of such design being accomplished, without the fault of defendant, they should acquit him;" but the court refused an instruction asked by defendant, embodying the principle contained in the foregoing instruction, with the addition, that "then defendant had the right to act upon appearances, and even kill Hatler if necessary to avoid the apprehended danger, and such killing was justifiable, although it might afterward turn out that the appearance was false, and there was, in fact, neither design on the part of Hatler to do him serious injury, nor danger that it would be done." On the evidence introduced for the defense, that instruction should have been given. 2

3. MURDER: deliberation.

4. ———: self-defense.

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Wharton Crim. Law, § 1026. We do not mean to say that a mere supposititious or conjectural danger—a danger existing only in the imagination of the accused, will excuse or justify a homicide. There must be an apparent danger affording a reasonable ground for apprehension on the part of the slayer, that unless he kill or disable his adversary, his own life or limbs are in imminent peril. Whether the appearances of danger to the accused were such as to afford such reasonable ground of apprehension, is a question for the jury. It was for the jury to pass upon the weight of the evidence on the part of the accused, as to the attitude and demonstrations of the deceased, at the time he was shot, and the court could not, virtually, withdraw it from them by refusing to present, in a proper instruction, that theory of the case.

Appellant also complains of one of the instructions given to the jury with respect to alleged threats made 5. —: threats. against him by the deceased. It was as follows, in substance: That although the jury should believe from the evidence that Hatler was reputed to be a vindictive, rash and dangerous man, and had, previous to his death, made threats against Eaton, and that these threats had been communicated to Eaton, yet these circumstances alone would not justify or excuse the offense of murder, provided they believed, that at the time of the homicide Hatler made no assault, and used no personal violence against Eaton.

No such instruction should have been given, because there was no evidence that any threat made by Hatler had ever been communicated to Eaton; and if it had been otherwise, the instruction is erroneous in that it requires one whose life has been threatened, to wait, before he begins to defend himself, for personal violence or an assault made upon him. The instruction in this respect is inconsistent with the instructions given by the court, on the theory of self-defense. We are not to be understood as giving sanction to the doctrine, that a threatened man may

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hunt the threatener, and slay him because of the threat. Such is not the law of this State. Although it has occasionally, in some of the states, had the sanction of their highest judicial tribunals, we think we may safely say, that it is not permanently embodied in jurisprudence of any state in the union. The person threatened has no right to take the life of the other, unless that other, when they meet, by his conduct manifests a purpose to carry the threat into execution ; but such purpose may be manifested by conduct falling short of personal violence or an actual assault.

We think the court did not err in instructing the jury on murder of the second degree. Whether it was a deliberate murder, or a murder committed without deliberation, on a provocation given at the time, or manslaughter, or excusable homicide, was properly left to the jury to determine, on all the facts before them. If they had found him guilty of either of the offenses, we could not say that the verdict was not warranted by the evidence.

Nor did the court err in refusing to compel the State to call other persons to testify for the State, after she had closed her evidence, on the suggestion of defendant's counsel that there were, besides those already introduced by the State, other persons present who witnessed the homicide. The *People v. Jno. Gordon*, 40 Mich. 716, is relied upon by appellant as sustaining him in this position. We do not so understand the case. Campbell, C. J., delivering the opinion of the court, observed that: "The prosecution had in court a witness named in the information, convicted of the charge, who was in the custody of the law, and who must necessarily have known the facts. Their suppression of this positive testimony, which they were in every consideration of justice bound to produce, entitled the prisoner to every inference that could be drawn from it." It was not there held that the refusal or neglect to call such witness, was an error which would warrant a reversal of the judgment.

6. CRIMINAL LAW:
witnesses.

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One accused of crime is entitled, in this country, to the State's process to compel the attendance of such witnesses as he may desire, and there is, therefore, no sound reason for requiring the State to introduce all persons to testify who were witnesses to the alleged criminal act. It is not unfrequently the case, that a hundred persons are present at a homicide, and to require the State to introduce them all, would unreasonably protract a trial, and cause a vast and unnecessary accumulation of costs. We see no reason why the State's attorney, acting under his official oath, and as much bound, as the representative of the State, to protect the innocent as to bring the guilty to justice, should not be left to his discretion, as to what number and character of witnesses he will call for the State, to prove an alleged crime, against the accused. If others than those called by him know facts favorable to the accused, he may have process to compel their attendance, and, if they come to speak the truth, a cross-examination by the State's attorney can be a matter of no consequence to them. We are not impressed with the force of the argument in favor of the proposition contended for by appellant's counsel.

Nor do we think the indictment open to the objection urged by the appellant, that the "striking," "penetrating" and "wounding" of the deceased is not alleged to have been willfully done. It alleged that defendant, "feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, did make an assault" upon the body of James Hatler, and that said Joseph Eaton, with a pistol then and there charged with gunpowder, etc., which he held in his hands, then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, discharged and shot off to, at and against said Hatler; and that said Eaton, with one of the bullets, aforesaid, out of the pistol, then and there by him shot off and discharged, then and there feloniously, deliberately, premeditatedly and of his malice aforethought, did strike, penetrate and

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wound the said Hatler, * * and concludes as follows: "That the said Joseph Eaton, him the said James S. Hatler, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, did kill and murder, against the peace and dignity of the State." We think that the indictment substantially charged the offense of murder.

The indictment also charged the wounding of deceased to have occurred on the 30th of August, and that Hatler, in consequence thereof, languished until the 1st of September, on which day of August in the same year he died. The insertion of August for September was manifestly a clerical mistake, and is not a sufficient ground for arresting the judgment. *Ailstock's case*, 3 Gratt. 650.

For the reasons hereinbefore assigned, the judgment is reversed and the cause remanded. All concur.

FRICK V. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant*.

1. **Demurrer to Evidence.** In passing upon a demurrer to evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, make in his favor; and if when viewed in this light it is insufficient to support a verdict in his favor, the demurrer should be sustained. But the court is not at liberty, in passing on the demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of plaintiff. That would clearly be usurping the province of the jury.
2. **Railroads: RUNNING OF TRAINS WITHIN CITIES: CARE REQUIRED.** In running a railroad train within the limits of a town or city, care should always be used by the servants of the company—the degree to be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway should be given, and the servants of the

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company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice to avert, if possible, any apprehended danger. A less degree of vigilance will ordinarily be required between streets than at crossings or when the train is running longitudinally in a street; but some vigilance is required even there, and the degree will necessarily vary with the attendant circumstances. In any case, the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances.

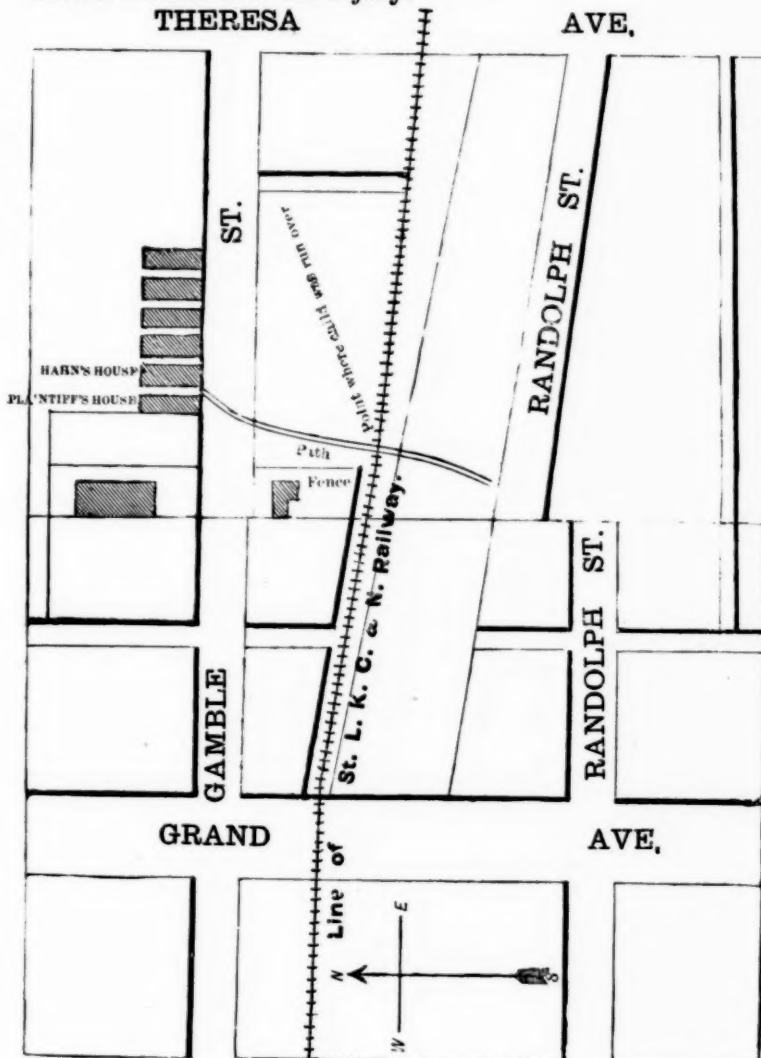
3. ——— : CASE ADJUDGED : QUESTION FOR THE JURY. In a suit brought on behalf of a child two years of age against a railroad company to recover damages for injuries sustained by being run over by a train within the limits of a city and between two streets, the testimony was conflicting as to the length of time the child was on the track before she was run over, but the track was level, the view between the streets was unobstructed, the road was unfenced, there were dwellings on either side, there was a path leading across the track near the spot where the injury occurred, and the train was approaching a crossing. *Held*, that in view of all these circumstances, if the servants of the company in charge of the train saw, or by the exercise of ordinary care could have seen the child in time to avoid injuring her, and failed to do so, the company was liable; and whether they were using such care was a question of fact for the jury.
4. ——— : RIGHT TO A CLEAR TRACK : LIABILITY FOR INJURIES. The general doctrine is that a railroad company is entitled to a clear track. But if there is reason to apprehend that the track may not be clear, the company's servants operating a train must not act upon the assumption that it is clear. If they do, the company will be responsible for the consequences.
5. ——— : NEGLIGENCE : INSTRUCTION. An instruction given by the trial court declared it to be the duty of railroad companies "to exercise the greatest caution and skill in the management of their business." *Held*, that although this degree of caution and skill can, perhaps, only be exacted when the relation of passenger and carrier exists, and the instruction may, therefore, be inapplicable to the present case, yet under the circumstances, (which are detailed in the opinion,) the judgment should not for this reason be reversed.
6. ——— : ——— : DANGEROUS RATE OF SPEED : QUESTION FOR THE JURY. In cases where what constitutes a proper rate of speed for a railroad train depends upon the length and character of the train, the location and particular surroundings of the track and other circumstances, and no law or ordinance regulating the speed of trains is in evidence, whether the rate of speed is improper or dangerous is a question of fact for the jury.

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Appeal from St. Louis Court of Appeals.

AFFIRMED.

The train in question consisted of ten cars pushed by a locomotive, which also drew a caboose after it. Three of the cars were loaded with stone. The rest were empty. The train came from the east. The accompanying diagram shows the scene of the injury.



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Wells H. Blodgett for appellant.

The plaintiff not being where she had a lawful right; not being where the defendant's servants were bound to look out for her, or expect her to be, the defendant's duty toward the child began only when its servants discovered her upon the track. Their duty did not begin when she could have been discovered, if the men in charge of the train had been expecting her, or if they had been specially charged with the duty of keeping a lookout for her. The question of when Mrs. Hahn discovered the child was wholly immaterial. The real questions for determination were: When did the men on the train see the child, and what efforts did they then make to stop? but on those material inquiries the plaintiff offered no testimony. If, in operating a train upon its private right of way, and while its servants are engaged about their usual and ordinary labors, they come so close upon a child that after it is discovered it is impossible for them, with all their efforts, to stop the train in time to save the child from injury, we cannot understand how, under those circumstances, it could be said that they had failed in the performance of any duty that they owed the child, because it seems well settled, both on reason and authority, that the persons in charge of the train had a right to act on the presumption that no child would be there. *Mulherrin v. R. R. Co.*, 81 Pa. St. 375; *Bannon v. R. R. Co.*, 24 Md. 125; *Maschek v. R. R. Co.*, 71 Mo. 276; *Gaynor v. R. R. Co.*, 100 Mass. 214; *Hughes v. R. R. Co.*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596; *Kay v. R. R. Co.*, 65 Pa. St. 276; *Morrissey v. R. R. Co.*, 126 Mass. 377; *Singleton v. R. R. Co.*, 7 C. B. (N. S.) 289; *Phil. & Reading R. R. Co. v. Hummell*, 44 Pa. St. 378; *Cauley v. R. R. Co.*, 11 Reporter, 67; *Meeks v. R. R. Co.*, 52 Cal. 602.

John McGaffey, Louis A. Steber and Louis Gottschalk

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for respondent, cited *Whalen v. R. R. Co.*, 60 Mo. 323; *McKeon v. R. R. Co.*, 43 Mo. 405; *Meyers v. R. R. Co.*, 59 Mo. 231; *Karle v. R. R. Co.*, 55 Mo. 482; *Bell v. R. R. Co.*, 72 Mo. 57; *Smith v. R. R. Co.*, 25 Kas. 738; s. c., 13 Cent. L. J. 118; 20 Am. L. Reg. N. S. 559; *Washington v. R. R. Co.*, 17 W. Va. 190; s. c., 23 Alb. L. J. 414; *Isabel v. R. R. Co.*, 60 Mo. 475.

HOUGH, J.—This was an action in the name of Lulu Frick, a minor, by her next friend, to recover damages for personal injuries sustained by her, by reason of having been run over by a gravel train of the defendant, midway between Grand Avenue and Theresa street, in the city of St. Louis. The train which inflicted the injury consisted of ten flat cars, seven of which were empty and three loaded with stone, propelled by an engine in the rear thereof, to which were attached a tender and a caboose.

The negligence of the defendant, which, it is alleged, occasioned the injury, is thus stated in the petition: "That immediately before said accident occurred, and while said train was moving toward the said Lulu, the servants and employes of defendant in charge of said train were duly warned of the approaching danger to said child by one Mrs. Hahn, who ran rapidly toward said train, and who, by loud cries and violent gestures, besought said servants and employes to stop said train of cars; but the said servants and employes carelessly, negligently and recklessly disregarded said warning, although they had ample time and means to stop said train in season to avert said accident; that the said injuries to the said Lulu Frick, resulting in the loss of her arm and leg, were caused by the carelessness and negligence of defendant, its servants and employes, in neglecting and failing to fence the said road, or place watchmen along the same, whereby the said Lulu Frick was permitted to wander upon said track, and the negligent and reckless disregard of the warning aforesaid, and in failing and neglecting to observe or notice the said

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Lulu Frick upon said track, or provide any watchmen upon the rear end of said train, to see that said track was clear, and in causing said train to be moved then and there at a dangerous speed; that said Lulu Frick was in full view of said train of cars for a considerable length of time before said train of cars reached her; that by the exercise of ordinary prudence, care or watchfulness upon the part of the employes in charge of said train, the said Lulu would have been observed, the train stopped and the accident averted."

The plaintiff was a little more than two years of age, when injured, and was quite active. She resided with her parents about two hundred feet north of the defendant's track.

Mrs. Maggie Hahn, who resided in the house next to that of plaintiff's parents, testified that a short time previous to the accident, which occurred between nine and ten o'clock in the morning, she left her house with her little boy to look for her cow; that she went straight south to the railroad track, leaving a path which runs from the vicinity of plaintiff's house across the railroad a little to her right. She then walked west along the railroad to Grand Avenue, a distance of about three hundred feet, and not finding her cow there, she sent her son to the next crossing, the distance to which is not stated, and when he returned, he said to her, that a train was coming—to get off the track. She immediately turned, saw the train in question, and also saw Lulu Frick, the plaintiff, standing in the middle of the track, five or six feet west of where the path crosses the track. The cars were then about one hundred and fifty or one hundred and sixty feet from the child, and were moving about as fast as witness could run. She at once ran toward the child, waiving her hand to attract the attention of the men on the train, calling to them to stop, that there was a child on the track, and calling also to the child to get off the track. The child attempted to get off, but was run over by several cars, which mangled

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one leg and arm, which were afterward amputated. The track was level and almost straight, and the witness said the child could have been seen a great distance. There was a brakeman on the front car, and several other persons between that car and the engine. A locomotive engineer and machinist testified that the train could have been stopped in seventy-five feet after the engineer received the signal, if running at four miles per hour, and in ninety-five feet if running at five miles per hour. How the plaintiff got upon the track does not appear. The witnesses supposed that she followed Mrs. Hahn. The defendant demurred to this evidence. The demurrer was overruled, and this action of the court is alleged as error.

In the case of *Buesching v. The St. Louis Gaslight Co.*, 73 Mo. 219, 231, this court said: "In passing upon a demurrer

1. DEMURRER TO EVIDENCE.

to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor, and if, when viewed in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. *Wilson v. Board of Education*, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow, either presumptions of law, or inferences of fact, in favor of plaintiff; that would clearly be usurping the province of the jury."

As the train in question was moving through the suburbs of a city between two streets about seven hundred feet apart, along an unfenced track with several dwellings on either side thereof, and as the view of the track in front of the train was unobstructed, and as the law requires the bell to be rung when the train approaches within four hundred and forty feet of a public crossing and kept ringing until it crosses the same, and as the train at the time Mrs. Hahn first saw it, was within a few feet of the place where it was the duty of the trainmen to commence ringing the

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bell and to observe whether any persons were approaching the crossing, and as Mrs Hahn was on the track at the crossing, waiving her hands and hallooing, and as the child was standing in the center of the track in a direct line between the train and Mrs. Hahn one hundred and fifty or one hundred and sixty feet from the train, and the train could have been stopped within ninety-five feet, the jury might fairly infer that the men in charge of the train saw, or by the exercise of ordinary care could have seen, the child, in time to have stopped the train before it ran over the child. Besides, it appears that the child was near a path which crossed the railroad track, and although no person had a right to go upon or across the defendant's track at that place, without the consent of the company, yet the presence of that path was itself a warning to the servants of the company that persons were in the habit of trespassing upon the track at that point, and that at least as long as the track remained unfenced, they might reasonably apprehend a continuance of such trespassing. It is true the law does not require fences to be erected at such places, but the company may lawfully erect them if it so desires. *Edwards v. Hann. & St. Jo. R. R. Co.*, 66 Mo. 567. We are of opinion, therefore, that the demurrer to the evidence was properly overruled.

The defendant then introduced testimony showing that there were only four servants of the company in charge of the train—engineer, fireman, brakeman and conductor. Two boys having no connection with the train were on the second or third car from the west end. The conductor was in the caboose at the time the alarm was given, the engineer and fireman were on the engine, and the brakeman was on the front car. The defendant's evidence tended to show that after a signal given to stop the train it could not be stopped in a distance less than its length, which was about three hundred and sixty feet. Some of the testimony on this point was that it could be stopped within from two hundred to five hundred feet, depending upon

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the exact rate of speed, the amount of steam, the dryness of the rails and the position of all the employes at the moment of the warning. It was admitted that the train was running on a level track at the time plaintiff was injured, and it was admitted by the plaintiff that the engineer of the train did all in his power to stop the train, after receiving the signal from the brakeman. Neither the engineer nor the conductor saw the child before it was run over. The fireman, who was on the left side of the engine, ringing the bell, testified that he did not see the child to know what it was, until about the time the train struck it.

The brakeman, who was on the front car and nearest the child, testified as follows :

"I was on the west end of the car and at my brake, and when I saw the child on the track I gave the engineer signals to stop. I gave the signal with my hand and arm (indicating a downward motion). I saw the child upon the track when the train was about a car and a half or two car-lengths from it. The cars are thirty feet long, and that would make it forty-five or sixty feet. I saw a woman up at Grand Avenue. I did not understand anything she said. I saw the child first, but I saw them both about the same time. I did not understand the meaning of the words or gestures made by the woman. I did not pay much attention to her. When I discovered the child I gave a downward signal, either with one hand or both; either would be proper. That signal means to stop; I also set my brake. When I gave the signal the engineer called for brakes. He gave one short sound of the whistle. I also felt the slack taken up from the other end of the train, which would indicate that he was trying to stop, and that he had reversed the engine. I heard the whistle before I felt the slack taken up. It was not over half or a quarter of a minute after I heard the whistle before I felt the slack taken up; it was right quick after it. After I gave the signal with my hands, the engineer called for brakes right away. He did it immediately. After I set the brake on

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the first car I ran back and set the brake on the next car behind me. I have been four years railroading, and worked a year and a half on a construction train. From my experience in railroading and in handling and moving a construction train, such as that was, I know it was not possible to stop that train after the child was discovered before it was run over. After I had set the brake on the front car, and gone back and set the brake on the next car, there was nothing else that I could do to stop the train before the child was run over."

Cross-examined: "I am still in the employ of defendant. I first saw the child near the corner of the fence. She was just climbing up on the rail. She just had one foot or one leg over the rail. She was not standing in the middle of the track. She did not get in the middle of the track at all that I saw. When I first saw her she was just climbing up over the rail. The first thing I did was to give the signal to stop, and then I set my brake. I did not look at the child all the time; I attended to my business. I do not know how far we were from Grand Avenue. I think we were near the middle of that block. I may have been a little excited. I could see up the track to Grand Avenue, and could have seen Mrs. Hahn while I was putting on my brake. I saw the child before I saw the woman. I saw the woman while I was putting on my brake, but I did not see her until after I had seen the child. My face was in that direction when I was setting up the brake. I was not watching the woman, but I could see what she was doing. The child was run over opposite the corner of that fence, about the middle of the block. I do not know that the child was standing in the middle of the track before I saw it. I don't think the child was in the middle of the track at all. I have sworn that when I first saw the child it was climbing over the rail. I think now she was just getting on the track. She was not in the middle of the track. I think we were moving at the time about five miles an hour. As near as I can

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judge, we were running five miles an hour." The foregoing is all of the brakeman's testimony which is material to the case.

At the instance of the plaintiff the following instructions were given:

1. It is no evidence of negligence on the part of defendant that it had not fenced its road at the locality where the alleged injury occurred. But if the jurors find from the evidence that defendant, its agents or employes, notwithstanding said road was not required to be fenced, could, by the exercise of ordinary prudence and care, have avoided or prevented the injury to plaintiff, then they should find for plaintiff.

2. Railroad companies, owing to the dangerous character of the machinery and vehicles they operate, will be held to the greatest caution and skill in the management of their business, but this extraordinary degree of care and skill on their part will not exonerate others who have been wanting in prudence or guilty of negligence; and hence, as a general rule, a railroad company cannot be held liable for negligence or want of caution or skill in a case wherein it is shown that the party seeking to recover has himself been guilty of negligence or want of care or prudence, directly contributing to the injury complained of. This rule, however, does not apply when the party plaintiff is an idiot insane person or an infant of such tender years as to be incapable of taking care of himself or herself, or incapable of apprehending danger, or of the exercise of prudence or foresight in avoiding danger. In this case the child, Lulu Frick, was incapable of contributory negligence, and the only question for the jury to consider, in determining the liability of the defendant, is as to whether the accident complained of was the result of negligence, or want of care or skill, on the part of defendant's employes.

3. If the jury find for the plaintiff, they should, in estimating the amount of damage, take into consideration

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the age and situation of plaintiff, her bodily suffering and mental anguish resulting from the injury received, and the loss sustained by reason of such injuries, and the extent to which she will be thereby disabled from ever earning her own living.

At the request of the defendant, the court gave the following instructions :

2. Defendant was not required to have a fence along the sides of its track at the place where the child was injured ; and if the jury find from the evidence that she got upon the track and was injured in direct consequence of there being no fence along the sides of the said railroad at said place, then she cannot recover in this action.

4. It was not negligence on the part of defendant's servants to disregard the cries and warnings of Mrs. Hahn before they understood and knew the meaning of such cries and warnings ; and if the jury find from the evidence that plaintiff was injured in direct consequence of a failure on the part of defendant's servants to obey such signals before they knew or understood the purpose for which they were made, then the finding must be for defendant.

5. If the jury believe from the evidence that the persons in charge of the train were exercising ordinary care in running, conducting and managing the same, and that they did not discover the child upon the track, or see her approaching the same, in time to prevent the injury complained of, then plaintiff cannot recover in this action, and the finding must be for defendant.

6. Defendant had a lawful right to run its trains upon the track at the place the injury occurred, either forward or backwards, and the fact that said train was being run at said time with the engine in the rear of the flat cars, does not constitute any negligence on the part of defendant, or on the part of those in charge of said train.

7. If, from all the facts and circumstances in evidence, you believe that the injury to the said Lulu Frick was the result of accident or misadventure, without negligence on

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the part of those in charge of the train, then the finding must be for defendant.

8. There is no evidence tending to show that plaintiff was recklessly or wantonly injured by those in charge of defendant's train.

The court, of its own motion, gave the following :

1. If the jury believe from the evidence that the injuries mentioned in this petition were inflicted upon plaintiff by defendant, or its employes, and that, by the exercise of ordinary care, skill or prudence on the part of such employes, the accident would not have occurred, then the jury will find for plaintiff.

2. If the jury believe from the evidence that defendant, through the negligence or carelessness of its employes, inflicted upon plaintiff the injuries mentioned in the petition, they will find for plaintiff, and assess her damages at such sum as they may believe she is entitled to, not exceeding the amount claimed in the petition.

3. Defendant was not required to employ watchmen, except at public crossings, to prevent children or other persons from getting upon its track, and its failure to employ watchmen for this purpose was not negligence; and if the jury should find from the evidence that plaintiff was injured in direct consequence of defendant's failure to employ such watchmen, plaintiff cannot recover, and the finding must be for defendant.

The only instructions asked by the defendant, and refused by the court, which it will be necessary to notice, are the following :

2. Although the jury may believe from the evidence that plaintiff was run over and injured by a train of defendant's cars, yet that fact does not authorize the jury to find a verdict for plaintiff; and unless it has been proved, to the satisfaction of the jury, that after she got upon the track, or her dangerous situation was discovered, the train could have been stopped in time to have prevented the

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cars from running over her, then the finding must be for defendant.

4. There is no evidence tending to show that the train in question was being run at a dangerous or unlawful rate of speed at the time plaintiff was injured.

There was a verdict and judgment for the plaintiff for \$10,000. This judgment was formally affirmed by the court of appeals, and the defendant has appealed to this court.

The plaintiff in this case being an infant of tender years, to whom no contributory negligence can be imputed, the only point remaining to be determined is, whether the question as to the defendant's negligence was properly submitted to the jury. No suggestion has been made that there was any negligence on the part of the parents of the plaintiff, which would preclude a recovery by her, nor does this record warrant any such suggestion. *Koons v. St. L. & I. M. R. R. Co.*, 65 Mo. 592; *Stillson v. Hann. & St. Jo. R. R. Co.*, 67 Mo. 671; *Cooley on Torts*, 682; *Kay v. Penn. R. R. Co.*, 65 Pa. St. 269.

The defendant contends that the first and second instructions given at the request of the plaintiff, and the first and second instructions given by the court of its own motion, are erroneous, in that they fail to tell the jury that the defendant was liable only in case its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which the plaintiff was exposed. This would undoubtedly be a proper qualification of the instructions referred to, if this were the case of an adult who had been guilty of contributory negligence; but such a qualification would be manifestly improper in this case, unless the servants of the defendant were under no obligation whatever to observe the track between Grand avenue and Theresa street, in order to avoid injuring such persons as might be upon the track, between said streets, even without the permission of the company.

2. RAILROADS: Running of trains within cities: care required.

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It has been repeatedly held by this court that greater care is to be exercised by the persons managing a train of cars, within the limits of a town or city, than is required in the country. *Brown v. R. R. Co.*, 50 Mo. 461; *Maher v. R. R. Co.*, 64 Mo. 276; *Hicks v. R. R. Co.*, 64 Mo. 439; *Harlan v. R. R. Co.*, 65 Mo. 24. In *Brown v. R. R. Co.*, *supra*, it was said that in towns caution should always be used, and the degree of care to be exercised must of course be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings, in a town or city, where the public have a right to be, and where people are constantly passing and re-passing, a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway, should be given, and the servants of the company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice, to avert, if possible, any apprehended danger. *Kelley v. Hann. & St. Jo. R. R. Co.*, *ante*, p. 138. The rule laid down in *Brand v. S. & T. R. R. Co.*, 8 Barb. 368, cited by defendant's counsel, which was a case of injury in a street, was disapproved in the case of *Johnson v. R. R. Co.*, 6 Duer 633, and also by the court of appeals in the same case, 20 N. Y. 65.

A less degree of vigilance will ordinarily be required between the streets of a town or city, than will be required at the street crossing, or when running longitudinally in a street; but, undoubtedly some vigilance is required even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would be ordinarily used by prudent persons performing a like service under similar circumstances.

In the case before us, the testimony is conflicting as to the length of time the plaintiff was on the track before she was run over, but the track was level, the view between the streets was unob-

3. — : case adjudged : question for the jury.
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structed, the road was unfenced, there were dwellings on either side, there was a path leading across the track, and the train was approaching a crossing; and we are of opinion, that if the servants of the defendant saw, or by the exercise of ordinary care under the circumstances stated, could have seen the plaintiff in time to have avoided injuring her, and failed to do so, the defendant is liable; and whether the servants of the defendant were, about the time of the injury, using such care, was a question of fact for the jury; and the fifth instruction given at the request of the counsel for the defendant, shows that they so regarded it. *P. & R. R. Co. v. Hummell*, 44 Pa. St. 377. The fact that the road was not fenced does not give a right of action, any more than any one of the other facts mentioned, would give a right of action, and it is clear that no one of them would; but it is the duty of vigilance, imposed upon the servants of the defendant by all these circumstances combined, and the absence of such vigilance, resulting in injury, which gives a right of action.

The rule here laid down is not in conflict with the general doctrine that a railroad company is entitled to a clear track: *liability for injuries*. When there is reason to apprehend that the track may not be clear, notwithstanding the right of the company to have it clear, persons operating a train cannot act upon the presumption that the track is clear, without being responsible for the consequences.

Counsel for the defendant also object to the second instruction given for the plaintiff, for the reason that in the first paragraph thereof, it is declared to be the duty of railroad companies to exercise the greatest caution and skill in the management of their business. This degree of care and skill, it is asserted, can only be exacted where the relation of passenger and carrier exists, and cannot be required of the defendant under the circumstances of this case. Conceding that the standard of care set up in this paragraph is inapplicable to

4. — : right to a clear track: liability for injuries.

5. — : negligence: instruction.

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the case at bar, still we do not conceive that it furnishes a sufficient reason for reversing the judgment in this case. The language employed is not applied to the defendant in this case. It is a mere general declaration of an abstract truth applicable alike to all railroads, which might very properly have been omitted, under the view which we have taken of this case, but which does not, in our opinion, materially affect the merits of this controversy.

A similar declaration, though criticised, was tolerated by this court in the case of *Brown v. R. R. Co.*, 50 Mo. 467, under circumstances, where, we think, it was calculated to do greatly more harm than in the case at bar. In the case of *Harlan v. R. R. Co.*, 65 Mo. 22, although the injury there complained of did not occur at a public crossing, it was said that it did occur in a crowded city, "where the public had a right to expect extraordinary care to prevent accident." And in the case of *Stillson v. R. R. Co.*, 67 Mo. 671, although the injury there complained of did not occur at a street crossing, "but on a part of the track where there was not even a private or occasional pathway, and where, consequently, the defendant had a right to presume that no one would attempt to cross," this court said: "The obligations, rights and duties of railroad companies and travelers crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other. *Harlan v. R. R. Co.*; *Cont. Imp. Co. v. Stead*, 95 U. S. 165. Whilst the highest degree of care should be exacted from those who operate such dangerous machinery, a corresponding obligation is imposed on the public, outside of passengers on the train, to observe the like caution. *Harlan v. R. R. Co.*, 65 Mo. 22." And in *Bell v. R. R. Co.*, 72 Mo. 50, which was a suit for injuries inflicted in a town, but not at a crossing, an instruction embodying the declaration contained in the paragraph now under consideration, received the tacit approval of this court.

Inasmuch as the question now directly presented for adjudication was not specially brought to the attention of

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the court in the cases cited, and cannot, therefore, be esteemed to be the point in judgment in those cases, we do not feel that we are departing from what can be regarded as the settled law of this court, in announcing the rule contained in this opinion. And we are of opinion that the defendant in this case had the full benefit of that rule.

The last paragraph or subdivision of the plaintiff's second instruction is the only point thereof which is in terms declared to be applicable to the facts in evidence, and that is in entire harmony with the first instruction given for the plaintiff, the fifth instruction given for the defendant, and the first instruction given by the court of its own motion, in each of which the jury were distinctly told that the defendant was liable only for a want of ordinary care. Under these circumstances we think the conjecture that the jury could have been misled by the first paragraph of this instruction is not at all probable.

The second instruction asked by the defendant was properly refused, for the reason that it exempts the defendant from liability unless the train could have been stopped in time to have prevented the accident after the dangerous situation of the plaintiff was discovered. This instruction should have been qualified by adding after the word "discovered" the words "or by the exercise of ordinary care would have been discovered." *B. & O. R. R. Co. v. Trainor*, 33 Md. 542.

The fourth instruction asked by the defendant was properly refused by the court. In cases like the present, ^{6. _____, _____; dangerous rate of speed: question for the jury.} where what constitutes a proper rate of speed depends upon the length and character of the train, the location and particular surroundings of the track and other circumstances, and no law or ordinance regulating the speed of trains, and applicable to the case, is in evidence, whether the rate of speed is improper or dangerous, is a question of fact for the jury. *Bell v. R. R. Co.*, 72 Mo 54, 61.

We have carefully examined the cases cited by the

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defendant, but do not deem it necessary to review them. Most of them are unlike the case at bar in its most essential features, and are, therefore, inapplicable. The case of *Singleton v. E. C. R. R. Co.*, 7 C. B. (N. S.) 289, though cited by this court in *Isabel v. R. R. Co.*, 60 Mo. 475, was not approved and is contrary to the weight of American authorities—*vide* Shear. & Redf. on Neg., § 493, note 4. In that case the driver saw the dangerous position of the plaintiff, a child three and a half years old, and made no attempt to stop the engine, contenting himself with merely turning on his whistle. The child's leg was cut off, and it was held that the company was not liable. The case of *Meeks v. R. R. Co.*, 52 Cal. 602, imputes negligence as a matter of law, to an infant six years of age.

Discovering no error in this record materially affecting the merits of the action, the judgment of the court of appeals will be affirmed. The other judges concur.

LINCOLN, *Appellant*, v. THOMPSON.

1. **Sheriff's Deed:** CERTIFICATE AND RECORD ENTRY OF ACKNOWLEDGMENT. It is not the intention of the law in relation to sheriffs' deeds that the clerk's certificate of acknowledgment indorsed on the deed shall be a copy of the entry made on the record. The former should contain but a brief statement of the fact of acknowledgment; the latter must set forth, in addition, the names of the parties to the suit and a description of the property conveyed. R. S. 1879, § 2394.
2. —: ACKNOWLEDGMENT. As against a purchaser for value and without notice of an execution sale, a sheriff's deed made in pursuance of the sale but not acknowledged till thirteen years afterward, will not be allowed to take effect as of the time of the sale.
3. **Possession, as Notice of Claim.** Possession may in some cases be evidence of a claim; but when a particular claim is notorious and is sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim.

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4. **Sheriff's Deed:** VARIANCE BETWEEN DEED AND CERTIFICATE OF ACKNOWLEDGMENT. A deed running in the name of G. as sheriff, and executed by him, recited, among other things, that the execution was delivered to L., "then sheriff" of C. county, that L., after making a levy, transferred the execution to G. "as his successor in the said sheriffalty, upon the expiration of his (L.'s) term of office," and that G. "sheriff as aforesaid" gave notice and made the sale. The clerk's certificate of acknowledgment indorsed upon the deed on the day of its date, stated that L., "sheriff of C. county," produced "a deed executed by himself as sheriff as aforesaid."

* and said sheriff acknowledged said deed to be his act and deed." *Held*, (by GANTT, Special Judge, HOUGH and HENRY, JJ., concurring; SHERWOOD, C. J., and RAY, J., dissenting,) that in the absence of any evidence tending to show that it was really G., and not L., who acknowledged the deed, it could not be held that the appearance of L.'s name in the clerk's certificate was a clerical error. Whether the court could have heard such evidence, if it had been offered, was not decided.

5. **Limitations.** A plea of limitations should always refer to the commencement or the proceedings supposed to be barred, not to any subsequent date.

Appeal from Clay Circuit Court.—HON. GEORGE W. DUNN, Judge.

REVERSED.

James E. Lincoln and Wash Adams for appellant.

The deed made and signed by Gittings as sheriff, but acknowledged by Long, is a nullity. The certificate of acknowledgment characterizes Long as sheriff, and it is so stated in the body of the deed. Long made the levy as sheriff, and under the law then could have made the sale and deed as ex-sheriff and properly acknowledged it. It is evident that he acknowledged the deed under the belief that it was his duty to do so. Will a court by construction set aside and annul the plain averments of an acknowledgment? It may supply defects and even make changes when the context indicates the intention on its face. But no case is cited holding that a court will contradict and destroy the plain and positive statements of an acknowl-

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edgment, and by construction supply their place with other and totally different statements. The legal acknowledgment of a sheriff's deed is essential to its validity and no title can pass without it. *Ryan v. Carr*, 46 Mo. 486; *Adams v. Buchanan*, 49 Mo. 71; *Cabell v. Grubbs*, 48 Mo. 356; *Allen v. King*, 35 Mo. 224, 225. The certificate of acknowledgment indorsed upon the deed itself must be within and of itself complete and no extrinsic evidence can be invoked to eke out its recitals. *McClure v. McClurg*, 53 Mo. 174; *Samuels v. Shelton*, 48 Mo. 447, 448; *Ware v. Johnson*, 55 Mo. 500; *Chaurin v. Wagner*, 18 Mo. 531. This deed not having been acknowledged according to law, its record did not impart constructive notice. If not acknowledged or proved its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchasers. *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, 46 Mo. 480; *Musick v. Barney*, 49 Mo. 458; 44 Mo. 247; *Cass Co. v. Oldham*, ante, p. 50.

Mrs. Thompson's possession was not notice to Lincoln of the purchase by the bank and Reid. It was accounted for by the fact that she was Jas. T. V. Thompson's wife, and also was consistent with the Tillman deeds, which were of record. Lincoln was not bound to inquire further. *Smith v. Yule*, 31 Cal. 183; *Mechan v. Williams*, 48 Pa. St. 241; *Billington v. Welsch*, 5 Binn. 129; *Rogers v. Jones*, 8 N. H. 264, 271; *Bell v. Twilight*, 2 Foster (N. H.) 522; *Coleman v. Barklew*, 3 Dutch. 357; *Emmons v. Murray*, 16 N. H. 398; *Patten v. Moore*, 32 N. H. 385; *Hewes v. Wiswell*, 8 Greenl. 98; *Mathews v. Demerritt*, 22 Me. 315, 316; *Butler v. Stevens*, 26 Me. 484; *Clark v. Morris*, 22 Ill. 434; *Bogue v. Williams*, 48 Ill. 371; *Brown v. Volkening*, 64 N. Y. 83; *Odle v. Odle*, 73 Mo. 294.

The record of the quit-claim deed from Reid and the bank to Mrs. Thompson was not constructive notice of the title claimed by them. It referred to the dower agreement in an indefinite way, but not to the sheriff's deed to them.

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So far as the record goes, it was an isolated deed, not in the line of title at all, and, therefore, not notice to any one who had not actual knowledge of it. *Crockett v. Maguire*, 10 Mo. 37; *Digman v. McCollum*, 47 Mo. 374; *Keller v. Nutz*, 5 Serg. & R. 246; *Maul v. Rider*, 59 Pa. St. 171; *Ely v. Wilcox*, 20 Wis. 530; *Day v. Clark*, 25 Vt. 402; *Hutchinson v. Hartmann*, 15 Kas. 142.

Lincoln, being a judgment creditor, buying at his own sale, is within the protection of the recording act. *Hill v. Paul*, 8 Mo. 482, 483; *Helm v. Logan*, 4 Bibb 78; *Reed v. Austin*, 9 Mo. 722; *Evans v. McGlasson*, 18 Iowa 150; *Hallock v. Platner*, 20 Iowa 121; *Gowen v. Doheney*, 33 Iowa 36; *Fash v. Ravesies*, 32 Ala. 451; *Grace v. Wade*, 45 Texas 529; *Maupin v. Emmons*, 47 Mo. 306; *Draper v. Bryson*, 26 Mo. 108; *Ryland v. Callison*, 54 Mo. 513; *Matson v. Capelle*, 62 Mo. 235; *Ford v. French*, 72 Mo. 250; *De Witt v. Harvey*, 4 Gray 486; *Harrison v. Hollis*, 2 Nott & M. 578; *Sevier v. Ross*, 1 Free. Ch. 519; *Duval v. Waggener*, 2 B. Mon. 183; *Emerson v. Littlefield*, 12 Me. 148; *Curd v. Lackland*, 49 Mo. 454. That he had no notice of the deed to Reid and the bank, we think the record abundantly shows.

Washington Adams and *Charles A. Winslow* also for appellant.

Glover & Shepley for respondents.

1. The certificate of acknowledgment to the Gittings deed is good. The statute does not require the name of the sheriff to be mentioned in the certificate. The name of Long may, therefore, be treated as stricken out. The law assumes that the court, clerk and sheriff know each other; and it is legally enough to state in any order that the sheriff or clerk of the court has done, or shall do this, or that, and it has never been considered necessary nor is it the custom to insert the name of any officer, whether judge, sheriff or clerk, in record entries, when their acts are noted. We may go further and say: that if this court

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should make an entry ordering the clerk of this court, John Smith by name, to do a certain thing, the order would be binding on the clerk of the court, though his true name is Henry W. Ewing. In such a case the name John Smith would be a self-evident mistake, and be disregarded. *Ingram v. State*, 37 Ala. 17; *Major v. State*, 2 Sneed (Tenn.) 11; Bliss Code Plead., § 195; *Thompson v. Hascall*, 30 Ill. 215; *Dyer v. Flint*, 21 Ill. 80; *Norvell v. McHenry*, 1 Mich. 227; *Laughlin v. Stone*, 5 Mo. 43. Now, if it be a presumption of law that the court always knows its own sheriff, it is impossible that Francis R. Long acknowledged this deed, because the pleadings admit that he was not the sheriff at the time. The same legal presumption forces the conclusion that Darius Gittings did make the acknowledgment, because he was sheriff at the time; and the court knew it, and knew him and knew that he acknowledged the deed.

2. It is a maxim of the common law that the presence of the body takes away error in the name. *Praesentia corporis tollit errorem nominis*. Broom Leg. Max., 639. Applied to the case at bar, this means that since the court knew Darius Gittings, and knew that he was sheriff of Clay county, therefore, it was Darius Gittings who appeared there in the body and acknowledged the deed. Such being the fact, the misnomer will not make the deed void.

3. Another rule of interpretation relieves this transaction of question. It is this: Words to which reference is made in any instrument have the same effect and operation as if they were inserted in the clause referring to them. Broom Leg. Max., 673. Instruments that refer to each other must be read together and be considered as one. *Doe v. Barnard*, 9 Sm. & M. 319; *Cornell v. Todd*, 3 Denio 130; *Daniel v. Veal*, 32 Geo. 589; *Petty v. Boothe*, 19 Ala 633; and when so taken and considered the intent shown by the whole shall prevail. *Gibson v. Bogy*, 28 Mo. 478; *Brownlee v. Arnold*, 60 Mo. 79; *Lewis v. Ins. Co.*, 3 Mo.

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App. 372; *Bradford v. Dawson*, 2 Ala. 203. Here the certificate of acknowledgment refers to the deed as made by the sheriff who acknowledged it. On examination of the deed that person is shown to be Darius Gittings. It also shows that Francis R. Long made the levy, but did not sell because his term of office expired; that Darius Gittings did sell and made his return of sale, and made the deed; and that the person who made it was the person who acknowledged it; therefore, the certificate and deed, taken together, show that Darius Gittings acknowledged the deed.

4. A sheriff's conveyance of land must be deemed as one act, composed of several parts, viz: Judgment, execution, levy, sale, return, deed and acknowledgment, all of which are essential to the conveyance. Such being the case, the court must look through them all, and see if an error at one place is not explained by a true statement at another. It is a familiar rule of pleading, that when the true name, sum, date or description is once stated, that will correct a misstatement of such a matter. R. S. 1879, § 3582. This is the suggestion of common sense, and applies to deeds and records as well as pleadings. Let us apply this rule. The record here says the name of the person who sold the land was Darius Gittings; it says then, virtually, that Darius Gittings made the deed. It says that Long went out of office and Gittings was his successor as sheriff; and that the man who acknowledged the deed was sheriff of Clay county.

5. If the sheriff's deed to the bank and Reid was not legally acknowledged in 1865, it was not, therefore, void. It was ready to be acknowledged and when acknowledged in 1878 it became operative and vested title in the grantees by relation to the date of sale in 1865, as between the parties to it and all having actual notice of it. *Porter v. Mariner*, 50 Mo. 364; *Leach v. Koenig*, 55 Mo. 451; *Wallace v. Lawrence*, 1 Wash. 503. The evidence, we claim, shows that Lincoln had notice.

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J. E. Merryman also for respondents.

The deed of the sheriff, Gittings, passed the title to the Farmers' Bank and Reid. The clerk committed a clerical error in transcribing the order of acknowledgment by inserting the name of F. R. Long as sheriff instead of Darius Gittings, the sheriff who made the sale and executed the deed. When the certificate of acknowledgment is inconsistent with the deed, and ambiguous, the court will look to the deed, or any part of it, together with the certificate, in order to arrive at the true meaning of the officer, which is that Gittings, not Long, made the acknowledgment. *Carpenter v. Dexter*, 8 Wall. 526; 45 Md. 395; *Samuels v. Shelton*, 48 Mo. 447, 448; *Wise v. Postlewait*, 3 W. Va. 452; *Sanford v. Bulkley*, 30 Conn. 344.

The only relief that appellant demands in his petition is, that the sheriff's deed to Tillman and the deed from Tillman to Calhoun, as trustee for respondent, be set aside, when respondent in her answer, filed in September, 1874, notified him that she held under the dower contract and the title of the bank and Reid; and she again reiterates her claim in her answer filed on the 28th day of January, 1878. Therefore, he cannot assail a title not attacked in the petition. *Bankston v. Farris*, 26 Mo. 175. Defendant Emily Thompson relies on the statute of limitation. She avers in her answer that she has been in peaceable possession of the property, openly and notoriously living on it and claiming it as her own, under the contract made with the trustees and the beneficiaries in said deed of trust, and the junior judgment creditors, and under the deed of the bank and Reid, made on the 31st day of October, 1867; and that ever since that time she has held, used and enjoyed said property under the titles aforesaid, and under no other title; and plaintiff never did attack said titles till the 28th day of February, 1878, and only by his replication to defendant's answer. Therefore, more than ten years having elapsed before the deed was attacked, she is protected by

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the statute of limitations; nor can plaintiff, Lincoln complain, because before the ten years elapsed, to-wit: on the 15th day of September, 1874, he was notified by defendant that she held the property under the title above stated. *Dudley v. Price*, 10 B. Mon. 84; *Christmas v. Mitchell*, 3 Ired. Ch. 535; Angell on Limitations, (6 Ed.) § 330, notes 3, 13. Defendant claims that the sheriff's deed to Tillman, and his deed to Calhoun, as trustee for her, if ever tainted with fraud, has been purged of all fraud by her contract with the trustees and the beneficiaries, and the junior judgment creditors, and her deed from the bank and Reid, which were and are valid contracts, made for the benefit of the creditors of Thompson; that Tillman paid over \$6,000 for the property, and she, as aforesaid, purchased it again; and, by reason of the contracts, all fraud has been wiped out, and the title made perfect. *Oriental Bank v. Haskins*, 3 Met. 332; 5 B. Mon. 327; *Bump on Fraud. Convey.*, 225; 2 Pick. 198; 1 John. Ch. 271; 32 Ohio St. 320.

GANTT,* SPECIAL JUDGE.—The original petition in this cause does not appear in the transcript, but it is admitted that the suit was commenced to the March term, 1874, of the Clay circuit court, and on the 20th day of December, 1877, an amended petition was filed, on which, with the answers thereto and the reply, the cause was tried at the February term. 1878. By the amended petition it was charged that James T. V. Thompson was in 1864 seized of the land in controversy. It contained about 200 acres and may be called the Thompson Home Place. Under a judgment obtained 2nd of May, 1862, which was alleged to have been revived from time to time, the plaintiff received, in September, 1870, a sheriff's deed duly executed and acknowledged, conveying to him all the interest of said Thompson to this land. The petition went on to state that in 1864, Thompson, being in embarrassed circumstances, and many unsatisfied judgments standing against

*Hon. Thos. T. Gantt, late Presiding Judge of the St. Louis Court of Appeals.

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him, procured to be issued executions thereunder, and caused one E. C. Tillman, a brother-in-law, to become, at sheriff's sale, the purchaser of this tract of land, and to receive a deed therefor from the sheriff; that this deed was dated the 28th of April, 1864; that the money for this purpose was furnished by Thompson, and that on receiving the sheriff's deed, Tillman executed an agreement in writing to convey the property to A. J. Calhoun in trust for Emily W. Thompson, wife, and James P., John D. and Anna R. Thompson, children of said James T. V. Thompson. In 1872 Tillman made such a conveyance accordingly. James T. V. Thompson died in 1872. It was alleged that the deed to Tillman and the conveyance to Calhoun were part of a fraudulent contrivance on the part of James T. V. Thompson to assure this real estate to his wife and children in fraud of his creditors; and the plaintiff prayed that the deed might be set aside and himself put in possession of the land which had constantly been occupied by Thompson in his lifetime and by his widow and children since his death.

James P. Thompson had died. The suit was instituted against Emily W. Thompson, John D. and Anna R. Thompson and their trustee A. J. Calhoun. The trustee and the minor children filed a general denial.

Emily W. Thompson answered separately and specially. She denied all the fraud charged in connection with the deed to Tillman, and alleged that the purchase by him was effected with money to her belonging, arising from her separate estate. Further, she set up a purchase from the Farmers' Bank of Missouri and Jno. W. Reid of this property in 1867. She said that they had purchased it at sheriff's sale from Thompson in April 1865, and had received therefor a sheriff's deed duly executed and acknowledged. This deed was alleged to be lost, and a copy was filed as an exhibit. It was alleged further that in 1862 Thompson, being largely indebted, had executed a deed of trust or mortgage to A. W. Doniphan and A. J. Calhoun

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to secure certain of his creditors ; that this deed was afterward foreclosed by the Clay circuit court, and a decree made for the sale of the real estate therein described, to pay these creditors ; that prior to the making of the decree, Doniphan and Calhoun, together with the judgment creditors of Thompson, on the one hand, agreed with Emily W. Thompson, on the other, that she should relinquish her dower in all the land sold, and that she should receive in consideration of such relinquishment one-sixth of the proceeds of the sales, and a deed from the Farmers' Bank of Missouri and Jno. W. Reid for the Thompson Home Place. This agreement was alleged to have been in writing and signed by the judgment creditors of Thompson, the plaintiff included, but to have been lost. The answer went on to say that this agreement had been carried out ; that defendant had released her dower to all the land sold, thereby much increasing the price realized therefor ; that she had received one-sixth of the proceeds, and also from the Farmers' Bank of Missouri and Jno. W. Reid a conveyance of the home place bearing date 31st of October, 1867 ; that ever since that time she had relied on the title thus acquired, holding the property adversely to all the world ; that this adverse possession had continued uninterruptedly for ten years ; and she pleaded this lapse of time as a bar to plaintiff's prayer for relief.

To this answer plaintiff replied on 28th of February, 1878, having on the 23rd moved to strike from it, as inconsistent and antagonistic with the defense of the Tillman transaction, all that was said respecting the acquisition of the title of the Farmers' Bank of Missouri and Jno. W. Reid. He denied the making of a deed by the sheriff to these grantors ; denied the existence of the judgment, the making of the sale alleged to have occurred in April, 1865, the execution and acknowledgment of the sheriff's deed.

It is stated in the transcript that the case was called for trial on the 2nd of March, 1878. This seems to be a

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clerical error, for the second day of the trial appears to have been March 1st, 1878.

The plaintiff put in evidence the sheriff's deed to him. There was some discussion as to the revival of the judgment under which this deed was made, so as to preserve the lien of it from the day when it was rendered. The circuit court held that an unbroken lien had not been preserved. No error is seen in this ruling; but it does not affect the conclusions reached by this court.

The plaintiff then put in evidence the deed to Tillman and his conveyance to Calhoun. He supplemented these with other testimony, which leaves no doubt as to the character of that transaction. The money bid by Tillman was paid by Thompson. Mrs. Thompson had no separate estate, and the conveyances by which she claimed the home place under Tillman and Calhoun were void as against the creditors of J. T. V. Thompson. It was proved that the plaintiff was not a party to what may be called the "dower contract." He knew nothing of its tenor, and nothing to impart notice of its existence. At the sale under the foreclosure it was announced that Mrs. Thompson would release her dower to all the land sold under the decree of foreclosure.

The defendant offered in evidence what was called a sheriff's deed, purporting to have been made pursuant to a sale of all Jas. T. V. Thompson's interest in the home place on the 26th of April, 1865. There was a subsisting and unsatisfied judgment against Thompson, on which an execution was issued June 2nd, 1864, and placed in the hands of Francis R. Long, sheriff of Clay county, on June 5th, 1864. He levied this writ on the home place. Apparently Long was succeeded in office by Darius Gittings, but when the one ceased to be, and the other became, sheriff, does not appear. Gittings seems to have made sale of the home place under this writ, in April, 1865, under the levy previously made in 1864 by Long. He executed a deed reciting the judgment, execution, advertisement and sale

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on the 26th of April; and judging from the only *indicia* before us, Long on that day produced this deed in court, claimed that he had executed it as sheriff, and acknowledged it. This paper itself was not produced; it was alleged to have been lost; a copy, or what professed to be a copy, from the books of the recorder of deeds for Clay county, was produced and seems to have been unchallenged so far as its claims to be a copy of the deed are concerned. How it came to be admitted to record by the recorder of deeds, we are not told, nor when this occurred. There is a memorandum under the clerk's certificate of the acknowledgment by Long, that it was "filed April 27th, 1865," but there is nothing to show who made this memorandum.

This paper can with no propriety be called a sheriff's deed; for until such an instrument has been executed, acknowledged and certified as the law directs, it has no validity. The plaintiff objected to it for these reasons, and the circuit court sustained the objection. The defendant then asked to be allowed to have this assumed copy acknowledged *nunc pro tunc* by Darius Gittings, late sheriff of Clay county, present in court, and this the court permitted, and allowed the instrument thus acknowledged to be read, against the exception of the plaintiff.

Up to this time the only certificate on the paper was in the following terms:

STATE OF MISSOURI, }
COUNTY OF CLAY. }

Among the records and proceedings of the circuit court begun and held at the court house in the city of Liberty, in the county of Clay, on the 26th of April, 1865, and on the third day of said term the following were had, to-wit: "Be it remembered, that on this 26th day of April, 1865, comes Francis R. Long, sheriff of Clay county, in the State of Missouri, and produces a deed executed by himself as sheriff as aforesaid to the Farmers' Bank of

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Missouri and Jno. W. Reid, jointly, for the following described real estate," (here follows the description,) "and said sheriff acknowledges said deed to be his act and deed for the uses and purposes therein mentioned, and the same is ordered to be certified on said deed accordingly."

Then follows a certificate by the clerk under the seal of court declaring the foregoing to be a full, true and perfect copy of the acknowledgment by the sheriff in open court; below which appears the words: "Filed 27th of April, 1865," without more. On the 9th of January, 1878, the recorder of deeds for Clay county certified this paper to be truly copied from his records. The acknowledgment of this paper, which the circuit court at the trial permitted Darius Gittings to make, bears date March 1st, 1878, and recites that Darius Gittings, late sheriff, etc., produces a deed (not a copy of a deed) executed by him, etc., etc., and acknowledges it accordingly. On the same 1st of March, 1878, Darius Gittings appears to have acknowledged this same paper to be his act and deed. On this last occasion he acted as an individual, not as sheriff. The paper thus acknowledged was then read in evidence against the exception of the plaintiff, and, this being all the evidence, the circuit court dismissed plaintiff's bill. After the usual motions he appealed to this court.

We are struck by the form of the certificate indorsed on both of the deeds before us; as well that relied on by the plaintiff, as that adduced by defendant.

1. SHERIFF'S DEED: certificate and record entry of acknowledgment.

The law governing the acknowledgment of deeds executed by a sheriff upon the sale of lands under execution, has been unchanged for more than sixty years. The statute has always directed that the sheriff * * * executing any deed for lands, etc., sold by virtue of any execution, shall acknowledge the execution thereof before the circuit court, * * * "and the clerk of such court shall indorse upon such deed a certificate of such acknowledgment under the seal of the court; and shall make an entry of such acknowledgment

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* * with the names of the parties to the suit, and a description of the property thereby conveyed," etc., etc. R. S., p. 179, §§ 2393, 2394. It seems very clear that the first thing to be done by the sheriff, after making a sale, is the execution of a deed to the purchaser; but if he stops here, the purchaser may take nothing. An indispensable solemnity is the acknowledgment (or proof) of this deed in open court. The clerk must then certify upon the deed that it has been so acknowledged (or proved) and this certificate must be under the seal of court. The deed is then complete and ready for delivery.

But the additional duty is laid on the clerk to "make an entry," (upon the records of the court) "of such acknowledgment * * with the names of the parties to the suit, and a description of the property thereby conveyed," etc., etc. The words italicized are no part of the acknowledgment; they are something supplemental to it, which the clerk is directed to enter of record. They should not be indorsed upon the deed. The certificate of acknowledgment indorsed upon that instrument, is the original, authentic, evidence of the act of the sheriff. This certificate cannot be aided, if defective in any particular, by reference to the entry upon the record, (*Samuels v. Shelton*, 48 Mo. 444; *Adams v. Buchanan*, 49 Mo. 64; *McClure v. McClurg*, 53 Mo. 173;) nor will it be invalidated because that entry is defective. *Scruggs v. Scruggs*, 41 Mo. 242. Instead of this order being observed in the deeds before us, it would seem that the entry upon the record was first made, and that then an order followed that this entry should be certified, or indorsed, on the deed. This is a cumbrous, unnecessary and dangerous departure from the directions of the statute. The certificate of acknowledgment indorsed on the deed, and the entry on the record, were not intended by the law-makers to be copies of each other. The certificate of acknowledgment itself may be and should be very brief. It need not, and should not, contain a description of the property conveyed. That is

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already given with particularity in the body of the deed itself. Neither should it name the parties to the execution under which the sale was made. *That* also the deed itself shows. But the entry on the record *should* contain these particulars: first, because the statute so directs, and secondly, because their mention on the record answers an intelligible and useful purpose. The distinction between the certificate indorsed upon the deed, and the entry on the record enjoined upon the clerk, is pointedly shown in *Samuels v. Shelton*, 48 Mo. 444. The form of the certificates adopted in the deeds before us is careless, and we think dangerous; but we will not pronounce it so irregular as to be void.

Our opinion as to the deed to Tillman and his conveyance to Calhoun, has been already intimated. In substance, Thompson himself, as far as his creditors are concerned, was the purchaser on this occasion.

The deed to Emily W. Thompson from the Farmers' Bank and Jno. W. Reid, is a very carefully guarded deed of quit-claim, conveying industriously only such title as the grantors had. They do not even cite the deed by which they derived title to the land; but describe the property as being the same which was sold to Tillman. On looking at the paper constituting their title, we see that it is neither the deed of Sheriff Gittings nor of Sheriff Long. The one did not acknowledge, the other did not execute it. It is among the unexplained puzzles of this case how it came to pass that this paper was admitted to record at all. Certainly no law with which we are familiar entitled it to be recorded, or made either the paper itself, or a copy of it, evidence. What especially excites our curiosity is the evidence by which it was made to appear that this paper was an authentic copy of anything. Gittings appears to have regarded it as an original document; which it confessedly was not. It was, however, received as a copy of a paper executed by Gittings and acknowledged by Long in 1865, the original being alleged to be lost, and this copy

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Darius Gittings was permitted to acknowledge as his deed. When he had done this the circuit court seems to have considered that the acknowledgment related back to the 26th of April, 1865.

One difficulty here seems serious. No paper which Gittings had ever seen before was produced, but something purporting to be a copy of a deed executed by him nearly thirteen years before. He declared this paper to be his act and deed and spoke of having executed it. At most, it could only have been a copy of something he had formerly executed. It seems wholly inadmissible to admit this instrument as evidence of a deed validated by relation, so as to take effect from the 26th of April, 1865. Plaintiff had no notice of the sale of which this deed was the supposed outcome. He was by the most meritorious title a purchaser for value. The execution under which the sale in 1870 was made, belonged to him. Any bid made by him, less than the face of the execution, was paid as soon as the hammer of the auctioneer fell. The fact of his being a purchaser for value was indeed admitted by the pleadings; but his relations to the executions, the sheriff's deed and the statute, which requires all sales made by a sheriff to be for cash, render it indisputable that, at least, it presumably appears that he purchased and paid for the property in question, in September, 1870.

It seems also that he had no notice of the sale made in April, 1865. Constructive notice is out of the question.

There was nothing having capacity to impart such notice. As to actual notice, we see and hear of none, unless the possession of the home place by the defendant was sufficient to apprise plaintiff as early as 1870 of this sale in April, 1865. But if we should consider the plaintiff bound to know that defendant claimed under the deed of the 31st of October, 1867, an inspection of that document would give him no intimation of the sale made in April, 1865. Reference is in that instru-

2. — : acknowl-
edgment.

3. POSSESSION, A S
NOTICE OF CLAIM.

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ment made to the sheriff's sale to Tillman ; but nothing is said of a sale by the sheriff to the Farmers' Bank and John W. Reid. Possession may in some cases be evidence of a claim ; but when a particular claim is notorious and sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim.

We are, therefore, of opinion that the deed made in April, 1865, (assuming it to be settled that such a deed was then made,) could not be perfected by acknowledgment in 1878 so as to cut out the plaintiff.

He certainly occupies a more advantageous position than was held by Merry in the case of *Alexander and Betts v. Merry*, 9 Mo. 514. That case was decided in 1845. It has recently been quoted with approval, and must be regarded as settled law. *Strain v. Murphy*, 49 Mo. 337. Although in every conveyance by which Merry claimed, the fact of a sale, the defective certificate of which alone gave him any standing, was recited, he was held unaffected by such recital. This decision might be much narrowed without weakening the case of the plaintiff in this suit. It is too familiar to need the citation of authority in its support, that the doctrine of relation is never applied to the injury of an innocent, still less of a meritorious stranger.

It was strenuously argued that the court should read the certificate of the acknowledgment made in 1865 as if the name of Gittings occupied the place of Long. It was urged that the maxim, "*præsentia corporis tollit errorem nominis*," required this reading of the certificate. This can only mean that if the court be satisfied that the acknowledgment was really made by Darius Gittings ; that he, and not Francis R. Long, was bodily present in court when the acknowledgment was taken ; then the clerical blunder of miscalling his name is of no consequence, or is cured by the proof before us of his bodily presence. But we fail entirely to perceive any evidence that Gittings, and not Long, acknowledged the deed on the 26th of April, 1865. All that we know on

4. SHERIFF'S DEED :
variance between
deed and certifi-
cate of acknowl-
edgment.

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the subject comes from the certificate of the clerk. Whether we should be at liberty to listen to any other evidence we need not stop to inquire; for absolutely none was offered. Under these circumstances it would be a startling thing if a court could strike from a legal document an essential and controlling word, completely changing its import. We have no reason whatever for the inference that the clerk made any mistake at all. If we suspected such a thing, we might be embarrassed by the difficulty presented by a misprision which affected an important interest, but which there might be serious difficulty in correcting. But as already said, all that we see, all that we hear, (and we may add, all that we fail to hear,) leads us to believe, not only as judges but as individuals, that the matter certified by the clerk is true so far as he declares that Francis R. Long acknowledged the deed we are considering; that it was Long, and not Gittings, who came into court, producing the paper which he certified; and though it is clear that a blunder was committed by some one, we are wholly unable to construe this certificate as signifying that the acknowledgment was made by a person whom it does not once mention. It is because we can see no reason for thinking that Gittings was bodily present to the clerk, that we cannot obtain any foundation for attempting to cure the supposed error of misnaming him.

There are cases in which a trivial discrepancy in the name of the person executing, and the person acknowledging a deed, has been reconciled by proof of the identity of the two. If a grantor's name be correctly recited in the body of the deed, and he signs it in his true name but acknowledges it by a wrong name; or when an erroneous name is signed but the right one used in the acknowledgment; the error is cured. Such was the case of *Middleton v. Findla*, 25 Cal. 80. There, however, the mistake was very trivial. The deed was executed by *Edward Jones*. It appears to be acknowledged by *Edmond Jones*. There was no question but that Edmond and Edward were the same

person. Obviously such cases are no guide to us out of the present difficulty.

It is certainly true that a person may become bound by any mark or designation he may think proper to adopt. *Butchers & Drovers' Bank v. Brown*, 6 Hill 443. But we have no sort of evidence that any one intended, in the certificate before us, to use one name for another.

We need not pause upon the defense resting on lapse of time. In 1878 defendant set up that she had held adverse & LIMITATIONS. possession for ten years and more. But she does not say that she had been in adverse possession for ten years when this suit was commenced; and the fact was otherwise. A plea of limitations should always refer to the commencement of proceedings supposed to be barred by lapse of time. If the statutory period then lacks a single day, there is nothing gained by the protraction of litigation for many years beyond the time within which suit should have been commenced.

As to the dower agreement, it became irrelevant when it was shown that plaintiff was not a party to it. Doniphan and Calhoun and any number of the creditors of James T. V. Thompson, on the one hand, and Emily W. Thompson, on the other, had no power to conclude the rights of any other creditors.

No question appears to arise on this agreement. The home place was not sold under the decree of foreclosure. If indeed the Farmers' Bank of Missouri and John W. Reid were the owners of the home place, their vendee would hold it against the world, but not by reason of the dower agreement.

Our opinion, therefore, is, that the plaintiff is entitled to the relief he asks, and we reverse the judgment and remand the cause, with instructions to the circuit court to make a decree in conformity with the views here expressed.

Judge NORTON did not sit, having been of counsel;

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HOUGH and HENRY, JJ., concur; SHERWOOD, C. J., and RAY, J., dissent.

SHERWOOD, C. J., DISSENTING.—I cannot subscribe to the foregoing opinion. I regard it as being utterly at variance with many decisions both of this and other courts bearing directly on the questions at issue; besides, as being the result of an entire misconception of the facts spread at large upon this record, and the necessary and legitimate inferences arising from such facts. I will briefly give the reasons why I think so:

I.

And first, as to the validity of the sheriff's deed to the Farmers' Bank and Jno. W. Reid; so far as the deed *itself* is concerned, no objection can be taken to it. The point, and the sole point of objection urged in the circuit court, was that the certificate of acknowledgment does not support and is not in conformity with the deed, because of the fact that the deed was made and signed by *Darius Gittings* as sheriff, but acknowledged by *Francis R. Long*, as sheriff. Let this objection be examined, and see what force it possesses.

The deed begins: "To all to whom these presents shall come, I, *Darius Gittings*, sheriff of the county of Clay, State of Missouri, send greeting." The deed then, after reciting the judgment rendered, the issuance of execution and its direction to the sheriff of Clay county, and its delivery to "Francis R. Long, then sheriff of said county," states that said execution "was by said Long transferred and handed over to me, as his successor in the said sheriffalty, upon the expiration of his term of office." The deed then recites that a levy of the execution had been made by Long on the property in controversy, among other, and that after such levy, Long had turned over the execution to Gittings as his successor. The deed also recites that "*I, Darius Gittings*, sheriff as aforesaid, gave notice of the time

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and place of sale," and then proceeds in the usual manner to the close in the name of "*Darius Gittings*, sheriff as aforesaid," and is signed and sealed by him. On this deed is indorsed the certificate of acknowledgment already mentioned, which bears the same date as the deed.

Now, nothing is better established law than that a court is bound to take judicial notice of its own officers; they will judicially notice their signatures, whether any official designation is added to their signatures or not, and will know also, when their terms expire. Bliss Code Plead., § 199, and cases cited. Taking this legal presumption as a premise, it must be apparent that *Darius Gittings*, who signed and sealed the deed, acknowledged it; for otherwise in the very teeth of that legal presumption, of that legal knowledge, we must originate a presumption or inference of fact that the circuit court of Clay county did not know that Long's term had expired or that Gittings' term had begun, did not know whether Long was its own officer when he came to acknowledge a deed signed and sealed by *Gittings*; in short, did not know whether Long was Gittings or the latter was Long. If, as the books state, the court knew its own sheriff, knew his signature, is it not a matter of wonder, if plaintiff's position be correct, that the court did not promptly rebuke Long when he came before the court to acknowledge a deed signed by Gittings, in which Long is referred to as the former and Gittings as the present sheriff? This question answers itself, and shows the supreme necessity of using, in investigations of this character, not only some knowledge of the law of evidence, but also common sense; and until you can overthrow the legal presumption that the court knew its own sheriff, you are bound to conclude that the insertion of Long's name in the certificate instead of that of Gittings was a mere misprision of the clerk; a mere error in the name, and not in the man; and so the misnomer should work no hurt.

The maxim, "*praesentia corporis tollit errorem nominis*"

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applies here, and was applied in England recently in an important criminal case, where a juror was addressed by, and answered to the *wrong name* and was afterwards sworn, and upon a case reserved the court said: "The mistake is not a mistake of the man, but only of his name *"

* At the bottom the objection is but this, that the *officer of the court*, the juryman being present, called and addressed him by a wrong name. Now, it is an old and rational maxim of law, that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. *Praesentia corporis tollit errorem nominis.*" *Reg. v. Mellor*, 27 L. J., Mag. Cas. 121.

Take another view of the certificate of acknowledgment: The body of the deed may be referred to, to support the certificate. *Martindale Conveyances*, § 259. In *Samuels v. Shelton*, 48 Mo. 444, the certificate of the clerk indorsed on the deed was the following: "Andrew Beaty, sheriff of said county, appeared in open court and acknowledged that he executed and delivered a deed to David Mulanix, as his voluntary act and deed, for the uses and purposes therein expressed." And Wagner, J., after stating that "the deed itself must contain the necessary certificate; and a *defective* certificate of acknowledgment cannot be sustained or helped by a resort to *extraneous* testimony," proceeds to say: "The only objection that can be plausibly urged against this certificate is that it does not specifically refer to the conveyance, but uses the phrase '*a deed*.' This is without doubt a mere clerical error. *The deed* sets out the execution, the transcript and sale, and the purchase by Mulanix; and the certificate of acknowledgment is placed on this deed by the clerk. It obviously refers to this deed and no other, and the mere inadvertence or clerical error of the officer making the indorsement ought not to be permitted to invalidate it. * * The intention is sufficiently clear on the face of the paper." That case undoubtedly shows two things: 1st, That the *deed* is

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not regarded in cases of this sort as *extrinsic evidence*; and 2nd, That it may be legitimately resorted to, to cure and correct any mere clerical error and inadvertence in the certificate, which, but for such resort and reference, would be left uncertain and ambiguous. That case is approvingly cited in *McClure v. McClurg*, 53 Mo. 173.

So also in *Carpenter v. Dexter*, 8 Wall. 515, it was held that in aid of the certificate of acknowledgment, reference may be had to the deed or any part thereof. So also in *Chandler v. Spear*, 22 Vt. 388, where the grantor's name was Richard G. Bailey, but the certificate of acknowledgment showed an acknowledgment in the name of "Richard G.," and it was ruled that as it appeared from an inspection of the whole instrument with reasonable certainty that it was acknowledged by Richard G. Bailey, the grantor, that this was sufficient. Similar rulings were made in *Bradford v. Dawson*, 2 Ala. 203, and *Sharpe v. Orme*, 61 Ala. 263. The court there say that "the only general rule with respect to the construction of these certificates, when the object is to support the registration, is that where the statute has been substantially complied with, the rights of the parties shall not depend on strict criticism, but that any portion of the deed may be examined to give effect and meaning to a certificate which is apparently defective." And the court further says: "The material fact is, that the grantors acknowledged the execution of the conveyance, and whenever this can be fairly and reasonably spelled out from the certificate, the requisitions of the law are satisfied. When this certificate is read in connection with the deed, the fact appears with certainty." To the same effect is *Wells v. Atkinson*, 24 Minn. 161, where the court say in reference to certificates of acknowledgment: "It is the policy of the law to uphold them, whenever substance is found, and not suffer them to be defeated by technical or unsubstantial objections. In construing them resort may be had to the deed or instrument to which they are appended." Authorities announcing the same rule could be

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greatly multiplied. *I have found none to the contrary.* So that it seems, if the authorities are to be followed, it is not such a very "startling thing" after all, for a court to read a certificate in connection with the deed, construe them together, and doing this, reject any repugnant word, which upon inspection of both deed and certificate would obstruct and defeat the obvious intention of the parties.

The Supreme Court of the United States, when speaking of such certificates, say: "Instruments like this should be construed, if it can be reasonably done, *ut res magis valeat quam pereat*. It should be the aim of courts in cases like this to *preserve* and not to *destroy*. Sir Matthew Hale said they should be astute to find means to make acts effectual, according to the honest intent of the parties. *Roe v. Tranmar*, Willes 682." *Kelly v. Calhoun*, 95 U. S. 710.

Applying to the case at bar the rule announced in *Samuels' case*, *supra*, and in the other cases cited, I read the certificate of acknowledgment. Apparently it was acknowledged by Francis R. Long, as sheriff of Clay county, but resorting, as I lawfully may, to the deed upon which that certificate is indorsed I find that Long, having previously levied the execution on the property in controversy, had gone out of office and turned over the *fi. fa.* to Gittings as his successor, that the latter had made the advertisement and the sale and signed and sealed the deed as the sheriff of Clay county. From this state of facts patent upon the face of the deed, to what other rational conclusion can I come but that *Gittings*, and not *Long*, sheriff of Clay county, was the actual grantor who acknowledged the deed? Whenever you are permitted to resort to the deed in aid of the certificate, all ambiguity vanishes and repugnancy ceases. This is so and you cannot deny it.

Take another view of the certificate and deed: Both bear the same date, April 26th, 1865; both have the same design; their mutual dependence and connection appear on comparing or reading them together, and, therefore, in the eye of the law they may be regarded as *one instrument*,

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although they do not refer to each other in terms. *Whitelsey v. Delaney*, 73 N. Y. 571, and cases cited; 2 Smith's Leading Cases, 259, and cases cited; *Noell v. Gaines*, 68 Mo. 649; *Waples v. Jones*, 62 Mo. 440; *Brownlee v. Arnold*, 60 Mo. 79. Following the authorities just cited and treating the deed and certificate as *one instrument* we may reject from the certificate the name of *Long* as the acknowledger, as being repugnant to the evident meaning and intent of the instrument; for still, after such rejection, enough will be left to constitute a good and valid sheriff's deed, properly acknowledged by the sheriff of Clay county—thus applying another maxim: "*Falsa demonstratio non nocet*," (2 Smith Leading Cases, 468, 472, and cases cited;) and this maxim applies as well to persons as to things; the description of the person who acknowledged the deed, being true in part, to-wit: that he was the sheriff of Clay county, but not true in every particular, to-wit: that his name was *Long*. 1 Greenleaf Ev., § 301.

The sole ground of objection, as before stated, made by plaintiff to the deed and the certificate of April, 1865, when first offered, was that heretofore mentioned, and no objection was then made that it was a *copy*. So that the case then stood as if the deed had been the original one. If *either* of the above positions I have taken be correct, the deed was properly admitted to record, and if so, imparted constructive notice to all subsequent purchasers. Besides, plaintiff admitted both in his answer and on the trial that the copy offered was a certified copy, and according to the statute, (§ 2302,) was evidence, since the original was proven to have been lost. Why then speak of this copy as an "assumed copy?"

II.

But granting that the deed was improperly admitted to record, and, therefore, imparted no constructive notice, still the only party who could take advantage thereof, would be what the books call an "innocent purchaser."

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And if plaintiff did not occupy this position then the re-acknowledgment of the sheriff's deed by Gittings, in 1878, vested the title in the bank and Reid by relation.

Much intellectual ammunition has, as I think, been wasted in the majority opinion about the deed being only a *copy*. The original being lost, a copy thereof containing the proper recitals, was to all intents and purposes a *new deed*, and the sheriff, by acknowledging the deed, and recognizing as his signature the name signed to the copy made that signature his own. This point certainly will not be disputed.

III.

The next thing for consideration is, whether plaintiff was an innocent purchaser. I will consider this matter from two points of view. 1st, As a question of pleading; 2nd, As a question of evidence.

And first, as to the question of pleading: In *Halsa v. Halsa*, 8 Mo. 303, Hart, a defendant, had pleaded in his answer that he was an "*innocent purchaser, without notice of any conflicting claims.*" Scott, J., in speaking of the insufficiency of this answer, approvingly cites *Frost v. Beckham*, 1 Johns. Chy. 288, where Chancellor Kent says: "If a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny notice though it be not charged; he must deny, fully and in the most precise terms, every circumstance from which notice could be inferred." And the party who in apt terms pleads that he is such a purchaser must *prove* it; the *onus* is on him. *Jewett v. Palmer*, 7 John. Ch. 65. In Story's Equity Pleading, section 805, it is stated that a party cannot set up a *bona fide* purchase for value *at the hearing*, unless pleaded formally, or set up by way of answer as any other defense, and in denying notice as the foundation of a superior equity, the plea or answer must not only negative such notice in *general* terms, but in specific terms as to all circumstances upon which it is claimed in the bill; and the plea must deny notice of plaintiff's title and claim

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previous to the execution of the deed and payment of consideration, and must deny notice of *plaintiff's title* and not merely the *existence of a person* who could claim under it. Plaintiff's reply to Mrs. Thompson's answer falls far short of the standard. He simply says that "he never had any notice or information whatever at or before the date of his said purchase of said real estate at sheriff's sale, in the year 1870, of any *claim of title* to the land in dispute by the Farmers' Bank of Missouri and John W. Reid or Emily W. Thompson." But he does not deny notice of the Clay county judgment, execution thereon, levy, sale, return, sheriff's deed to the bank and Reid, and the acknowledgment and recording thereof. Knowledge of these he virtually admits, contenting himself with averring their nullity. He does not aver payment of purchase money, nor that his bids were credited on the judgment, nor when he received his deed, nor deny notice at these periods. Even upon the *pleadings* then, according to the authorities cited, he is not an innocent purchaser, and consequently has no right to prove what he has not pleaded. The question is *dehors* the case.

2nd. Conceding, however, plaintiff's reply to be unexceptionable, his evidence would not support it. The *onus* being as before stated, he has fallen as far short in his evidence in this regard as he did in his pleading. Granting that plaintiff himself was without notice of Mrs. Thompson's rights, a debatable question, as will be presently seen, I cannot help regarding Jas. E. Lincoln as the attorney of his brother, when the sale under the foreclosure occurred. The plaintiff does not deny that his brother was his attorney, and on his shoulders rests the burden of proving lack of notice. He did not deny that he knew his brother was prosecuting his claim; and if he did not disaffirm the acts of his attorney, he ratified them, and that ratification related to the time of the act done. And Jas. E. Lincoln does not make it appear that he was *not* his brother's attorney. He says: "I can't say I was a

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regular attorney for plaintiff till I brought the ejectment suits in 1871." Yet he states: "I looked out for a chance to make my brother's debt, all I could. He never instructed me to do so, but I supposed as a matter of course he wanted to make his money." Yet he admits he brought a suit in 1867 to revive the judgment lien under which plaintiff bought; that he instituted garnishment proceedings, and had executions issued in behalf of his brother. Was all this done without authority either *express* or *implied*? There is nothing in this record which induces me to doubt that his brother either directly or else indirectly sanctioned every step taken by his "irregular" attorney. If no such sanctioning occurred, it was a very easy matter for plaintiff to have interposed a denial when on the witness stand, and he was bound to do this if he desired to maintain the position of being an innocent purchaser. I am persuaded, therefore, that Jas. E. Lincoln must be regarded as plaintiff's attorney, and if he occupied this relation, then notice to him was notice to plaintiff.

And there is abundant evidence in this record showing notice to Jas. E. Lincoln. He was present at the foreclosure sale; he heard the announcement made by the sheriff, by Gen. Doniphan, and by Judge Norton, of the agreement entered into between the mortgage creditors and Mrs. Thompson for her relinquishment of dower. Whether he knew of "*any written dower agreement, or what that agreement was,*" does not signify. He heard the announcement made in the most solemn manner at the sale. He purchased at the sale, took a deed and received in that the relinquishment of Mrs. Thompson's dower. After all this it is futile for him to say, he was unapprised of Mrs. Thompson's rights. He either had knowledge or notice of those rights, or else abundant provocation and reason to institute inquiry respecting such rights, and this is sufficient. Surrounded by such circumstances he was grossly negligent if he failed to use the clue thus furnished him; and *gross negligence is tantamount to knowledge. Leavitt v.*

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LaForce, 71 Mo. 353, and cases cited. The majority opinion takes no note of the fact of James E. Lincoln being plaintiff's attorney, nor of his testimony in that regard, nor of notice communicated to him in manner as aforesaid.

IV.

The foregoing are only a few of the reasons which might be urged to sustain the action of the court below. A more righteous judgment, one more sound on its basis of facts, and more sound on its basis of law, in my humble opinion, was never rendered in any court of justice.

The case of Mrs. Thompson is one of peculiar hardship, and speaks, (or rather *should speak*.) to the ear of a court of equity with a most persuasive tongue. "In order (as she says in her answer) that she might save a home for herself and children and receive something to support them on," she is induced to sign the dower agreement, whereby property which would not have brought more than \$50,000, at the utmost, yielded \$73,000. But for this agreement the foreclosure sale would have swallowed up the whole property, and we should not have heard of plaintiff's "*most meritorious title*."

If these facts do not give Mrs. Thompson a superior equity to plaintiff's, then the sooner we erase that meaningless word of six letters from our vocabularies the better. What! Shall a court of equity, which favors dower; which clings to substance and discards form; which shelters under its protecting shield its wards, the widow and the orphan; which does battle for the weak against the mighty—shall such a court, I say, seize with apparent avidity on the "shadow of a shade" of an empty technicality, discountenanced and held for naught by all courts of law, and thus deprive a poor widow of her *home*, and her *dower's worth*? I regret to say that in this instance the above interrogatory is answered in the *affirmative*.

Over in Illinois, however, where, in an equitable proceeding for *dower*, it appeared that the sheriff's deed, reg-

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ular in other respects, granted to the husband "all of the right, title and interest which he and the other *plaintiffs* in the execution had in the lot" sold, the court said: "This is but a clerical error which will not be regarded by a court of equity or any court while acting upon and adjusting equitable rights. Stow could at any time have had the mistake corrected by procuring a conveyance from the proper officer. This mistake in nowise changes the rights of the parties to this proceeding." *Stow v. Steel*, 45 Ill. 328. The "strong meat" of this equitable doctrine, would doubtless be repudiated here.

Moreover, Mrs. Thompson clearly has a dower right in the premises in controversy, if the dower agreement as to those premises is to go for nothing, as this court declares. But this right seems not to have arrested attention in the majority opinion; but an iron-bound decree is to be entered by the circuit court, and no account is to be taken of that dower right, so far as appears in the mandate of this court.

I leave off, by saying, that after a careful consideration of this whole case, I am for affirming the judgment of the circuit court. RAY, J., concurs with me.

KLUTTS V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant*.

1. **Action for Personal Injuries:** INSTRUCTION. The trial court, in an action for personal injuries, instructed the jury that if they should find for plaintiff, they should allow "First the expenses incurred by plaintiff in attempting to cure himself of his injuries; Second, His loss of time; Third, His bodily pain and suffering and mental anguish," etc., etc. *Held*, that this instruction, while not as definite and precise as it might have been, was not open to the objection that it assumed that plaintiff had incurred expense, lost time and endured bodily pain, etc., and the judgment should not

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be reversed for the mere want of precision, especially as plaintiff's evidence as to these matters was not contradicted.

2. ———: ———. The trial court, in an action for personal injuries, instructed the jury that although plaintiff may not have employed a skillful surgeon to attend him, still "if he did exercise such care and attention in regard to his case as a prudent man would under his particular circumstances and situation have done," they should find for him. In other instructions the jury were told in detail what facts within the range of the evidence, if found, would constitute contributory negligence and prevent plaintiff's recovery. *Held*, that the instruction quoted, though general, was not misleading, and taking all the instructions together the question of negligence was fairly presented to the jury.
3. **Verdict.** A verdict for \$3,500 for personal injuries; *Held*, not excessive.

Appeal from Mississippi Circuit Court.—HON. D. L. HAWKINS, Judge.

AFFIRMED.

Bennett Pike for appellant.

Robt. Waide and J. B. Dennis for respondent.

HENRY, J.—This is a suit to recover damages for alleged personal injuries sustained by plaintiff in consequence of a train of defendant's cars, on which plaintiff was a passenger, being precipitated over an embankment of said road. The controversy is in relation to the extent of plaintiff's injury, and his alleged contributory negligence after he was injured, whereby it was aggravated, the defendant insisting and having introduced evidence tending to prove that plaintiff had imprudently exposed himself, and failed to procure proper medical attention after he received the injury; defendant also claiming that the cars were thrown from the track in consequence of a hidden defect in the iron rail, which no examination would have disclosed. There was a judgment for plaintiff for \$3,500, from which defendant has appealed.

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For plaintiff the court instructed the jury as follows:

1. If the jury believe from the evidence that defendant, through negligence or carelessness, (and without negligence on the part of plaintiff,) inflicted upon plaintiff, any of the injuries mentioned in the petition, they will find for plaintiff, and assess his damages at such sum as they may think him entitled to, not to exceed the sum of \$10,000.

2. Negligence in its primary sense is the want of care, caution, diligence, skill or discretion in the performance of an act or duty, by one having no intention to injure the person complaining thereof, and includes every omission to perform a duty imposed by law, for the avoidance of injury to persons or property. Railroad companies are bound to maintain a good, safe track and road-bed at all times; and proof of a break in the track by which the cars were thrown off is sufficient evidence of negligence to put the company upon the defense in an action by a passenger for injuries sustained.

3. If the jury find for plaintiff, they will allow, first, the expenses incurred by plaintiff in attempting to cure himself of his injuries. Second, His loss of time occasioned by this. Third, His bodily pain and suffering, and mental anguish. Fourth, The present and prospective condition of the wounded limbs and spine resulting from the injury; and to this sum they may add the future effect of the injuries upon his health, the use of his limbs and spine, his ability to labor, and attend to his affairs, and generally to pursue the course of life and business he might otherwise have done, and which are the direct, legal and necessary results of the injuries.

4. If the jury believe from the evidence that after the accident, by which plaintiff was injured, had occurred, defendant employed a surgeon, or sent one of their surgeons employed to visit the wounded and attend them, that in waiting upon plaintiff, he made a mere cursory examination or none at all, and dressed his injuries in an

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unskillful manner, then injuries resulting from this fact cannot be imputed to the plaintiff for negligence.

5. If plaintiff exercised such care and attention in regard to his injuries, as a careful and prudent man should have done, under the particular condition and circumstances of the plaintiff, after the injuries were received, he is not debarred from recovering from the defendant all the damages which resulted from his injuries, although a part of it may have been caused by the unskillfulness of the surgeon who treated him.

6. Although the jury may believe from the evidence that plaintiff did not employ a skillful surgeon to attend him, after he discovered the nature of his injuries, still if they believe that plaintiff exercised such care and attention in regard to his case as a prudent man would under his particular circumstances and situation have done, then plaintiff is not guilty of contributory negligence.

For the defendant the court instructed as follows:

1. Railway companies do not warrant the safety of passengers.

2. And if the jury believe from the evidence that the track, ties, embankment and rails upon which defendant operated its train of cars at the time of the accident, were reasonably safe for the purpose for which they were erected and constructed, and without any fault, omission or neglect of defendant, the car in which plaintiff was a passenger, was thrown from the track, plaintiff cannot recover for an injury occasioned by said accident.

3. If the jury believe from the evidence that plaintiff was injured, as alleged, on defendant's railway, and that after receiving such injuries, he was advised by a surgeon who examined his fractures and wounds to have his wrist set, and his collar-bone set, and that he for any cause refused to have this done, and permitted the said fractured members to remain unset, and unreduced, and by reason of such refusal, the said fracture and wounds have been aggravated and been rendered permanent, then for such

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injuries so aggravated and rendered permanent, plaintiff cannot recover damages.

4. If the jury believe from the evidence that plaintiff was injured by the accident on defendant's railroad, and had the head of his left ulna fractured, and his collar-bone broken, a portion of the tibia of his left leg fractured, and his back hurt, and that after receiving these injuries, he walked along the embankment of defendant's railway, and mounted into the cars, went to Charleston on said road, and stayed all day at Charleston, and took passage at Charleston on one of defendant's trains to Poplar Bluff, and was thence driven to Kitchen's Hotel in Poplar Bluff, and was thence driven four miles to his sister's house, and that he walked out to a graveyard there, that he remained there two or three days, and then returned to Poplar Bluff in an open farm wagon, then took passage on defendant's cars and returned to Charleston, and then went to Union City, Tennessee, and thence to Gleason station, Tennessee, and thence home, and that during all this time, plaintiff failed and neglected to call in and upon a competent surgeon to attend to said injuries and fractures, and that he walked every day since, and gave his spine no opportunity to recover by rest and quiet, and his injuries were thereby aggravated, and if they further find that the failure of plaintiff to consult a competent surgeon, and the other acts and conduct of plaintiff constituted negligence, directly contributing to the aggravation and permanence of the said injuries and pain and suffering therefrom, then plaintiff can recover no damages from defendant by reason of injuries thus enhanced, aggravated and made permanent.

5. Even though the jury believe from the evidence that plaintiff was injured in his spine, leg, arm and wrist, by reason of the accident complained of, yet, if they further find from the evidence that after receiving the injuries complained of, he failed to exercise reasonable care and diligence in the choice and employment of a competent surgeon to attend to the same, and the means to effect a

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speedy and complete cure of the wounds, and that by reason of such failure to exercise such reasonable care and diligence, his said injuries were rendered permanent, or his suffering enhanced, then plaintiff cannot recover for such injuries or suffering caused or enhanced by his neglect to use such care and diligence.

If the jury believe from the evidence that plaintiff was injured on defendant's railway, while a passenger thereon, and the injuries received were at the time of the accident slight, and that thereafter he refused to have them or either of them attended to, and disregarded the advice of the surgeon in treating the same; and that the said injuries and fractures were thereby aggravated and the pain thereby increased, then plaintiff can recover no damages, for what was caused by his own imprudence and neglect.

The defendant's objection to the third and fourth given for plaintiff, is, that they assume the existence of the facts upon which they are predicated. With re-

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instruction.

spect to the facts mentioned in the third, viz: that plaintiff incurred expenses, had sustained a loss of time and suffered bodily pain and mental anguish, occasioned by the injury, and that it had permanently impaired his ability to labor and to attend to his affairs, and generally to pursue the course of life and business which he might otherwise have followed, the court does not declare that plaintiff had incurred any expenses or that any loss of time had been sustained by him, or that he had suffered any bodily pain or mental anguish occasioned by the injury, or that his ability to labor had been permanently impaired, but told the jury if they found for plaintiff they would allow him the expenses he had incurred in and about his case, etc. What expense? Such as the evidence proved that he had incurred, and that is evidently the qualifications which attaches to each of the facts and conditions stated in the instruction. There was, besides, no conflict of evidence on those points. It was all one way, and we are not inclined to reverse the judgment under such cir-

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cumstances, because the instruction was not as definite and precise as it might have been.

The fourth instruction does not assume the fact that defendant's surgeon made but a cursory examination of plaintiff's wound, and dressed it unskillfully. By that instruction, the jury was told, that if they so found from the evidence those injuries resulting from such conduct of defendant's surgeon could not be imputed to plaintiff's negligence.

Instruction No. six is objected to on the ground that it is inconsistent with three, four and five given for defendant. It asserts a correct abstract proposition of law. It is not absolutely the duty of a party, under the circumstances in which plaintiff was placed, to employ a skillful surgeon. There may have been no skillful surgeon accessible to him, or he may have employed one recommended as skillful, who proved otherwise; and the court correctly declared the duty of plaintiff to be, the exercise of such care and attention, in regard to his case, as a prudent man under the circumstances would have exercised. The instruction is general, but not misleading and in the third, fourth and fifth of defendant's instructions the facts upon which defendant relied to bar a recovery for any aggravation of the injury occasioned by plaintiff's negligence, are distinctly declared by the court, if found by the jury, to be a bar to such recovery, and there is no conflict between them and plaintiff's sixth. Plaintiff's sixth instruction declared it to be his duty to exercise such care and attention in regard to his case as a prudent man would have exercised under the circumstances, and the defendant's instructions state what conduct on the part of the plaintiff would be a breach of that duty. The fifth for plaintiff is to the same effect, and we are unable to see how defendant could have been prejudiced by instructions which correctly enunciate a legal proposition in general terms when those facts and conditions which might deprive the plaintiff of the benefit of the principle announced in

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his instructions, are distinctly stated in instructions given at defendant's instance.

The issue, with respect to the cause of the accident to the train which occasioned plaintiff's injury, was fairly submitted to the jury by the court in instructions one and two, given for plaintiff, and number two given for defendant. The principle of law for which defendant's counsel contends, was distinctly recognized and announced by the court in defendant's second instruction, and there is nothing in those given for plaintiff in conflict with it. The question having been submitted to the jury, under proper instructions, we cannot interfere with their verdict, there having been evidence introduced to warrant their finding.

Nor can we interfere on the ground that the damages assessed are excessive. That was peculiarly a question
3. VERDICT. for the jury, and we do not think that \$3,500 exceeds the amount plaintiff was entitled to recover, assuming the testimony introduced by him, as to the extent of his injury, to be true. All concurring, the judgment is affirmed.